

NLWJC - KAGAN

EMAILS CREATED

ARMS - BOX 006 - FOLDER 003

[8/22/1998 - 9/27/1998]

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. email	Elena Kagan to Christopher Jennings re: book (partial) (1 page)	08/22/1998	P6/b(6)
002. email	Elena Kagan to Laura Emmett re: personal (4 pages)	09/08/1998	Personal Misfile
003. email	Elena Kagan to Laura Emmett re: personal (7 pages)	09/09/1998	Personal Misfile
004. email	Elena Kagan to Ron Klain re: breakfast (1 page)	09/24/1998	Personal Misfile

COLLECTION:

Clinton Presidential Records
Automated Records Management System [Email]
OPD ([From Elena Kagan])
OA/Box Number: 250000

FOLDER TITLE:

[8/22/1998 - 9/27/1998]

2009-1006-F
ry940

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Withdrawal/Redaction Marker

Clinton Library

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001. email	Elena Kagan to Christopher Jennings re: book (partial) (1 page)	08/22/1998	P6/b(6)

COLLECTION:

Clinton Presidential Records
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RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME: 22-AUG-1998 11:51:45.00

SUBJECT: book

TO: Christopher C. Jennings (CN=Christopher C. Jennings/OU=OPD/O=EOP @ EOP [OPD])

READ: UNKNOWN

TEXT:

see below; it would be helpful if you could call him. i agree that we shouldn't make much out of health in his "book" P6(b)(6)

[001]

P6(b)(6) but we should make every effort to show cooperation. thanks.

----- Forwarded by Elena Kagan/OPD/EOP on 08/22/98 11:50 AM -----

"Christopher Edley, Jr." <edley @ law.harvard.edu>

08/19/98 09:58:40 AM

Record Type: Record

TO: Elena Kagan/OPD/EOP

cc: Maria Echaveste/WHO/EOP

Subject: book

Elena:

1. My understanding is that you and Maria have spoken again about DPC engagement on ideas for the workplan chapter. Mike Cohen is fully engaged, and I'm really pleased at how that effort is moving along thus far.

2. CRIME: I've suggested that Scott Palmer contact Jose Cerda directly to get the criminal justice piece moving, because we are running out of time. Scott has drafted something to help get the juices flowing.

3. HEALTH: On Health, it seems to me we have to do something, but the question in my mind is whether there anything to be said in the workplan chapter beyond recapitulation of the Health Disparities initiative announced a couple of months ago. I've suggested that David Campt of PIR raise this with Chris Jennings before reaching out to HHS and outside experts for their thoughts. Unless people feel there are substantial possibilities on this front, it doesn't seem like it deserves a workgroup effort comparable to education, economic development, crime, or even civil rights.

The particular wrinkle I suggested to David Campt, as he studies the documents and chats with Jennings, is whether the Health Disparities initiative contains a comprehensive set of non-federal elements. It probably does. Just a question to explore.

PLEASE SAY SOMETHING TO JENNINGS SO HE HAS CONTEXT FOR THIS. Thanks.

4. SOCIAL SERVICES: I haven't given much thought to this general programmatic area. [I assume that we will handle job training stuff either in the economic opportunity working group or the education working group -- whichever makes sense to you and Sperling.] Unless you have feel otherwise, let's not attempt any serious work on this front for now. Child

care can be handled as an adjunct of job strategies.

5. DEADLINE: Maria has, I hope, said something about the 9/10 deadline for my memorandum to POTUS. Getting that written, vetted, cleared and submitted by 9/10 will be tough.

So, tell me honestly: Are you on board, or are you "actively skeptical"?

ciao

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME:24-AUG-1998 13:46:48.00

SUBJECT: Telemarketing Fraud

TO: Fred DuVal (CN=Fred DuVal/OU=WHO/O=EOP @ EOP [WHO])

READ:UNKNOWN

TEXT:

jose cerda. thanks.

----- Forwarded by Elena Kagan/OPD/EOP on 08/24/98 01:46
PM -----

Fred Duval 08/24/98 12:22:33 PM

Record Type: Record

To: Elena Kagan/OPD/EOP

cc: Mickey Ibarra/WHO/EOP, Lynn G. Cutler/WHO/EOP

Subject: Telemarketing Fraud

I have now collected a lot of materials on state regulation of
telemarketing fraud and Atty Gen enforcement measures. Who will be the
lead on any event we do on this topic?

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME:24-AUG-1998 13:46:18.00

SUBJECT: Women's Accomps Document - Updated

TO: Nicole R. Rabner (CN=Nicole R. Rabner/OU=WHO/O=EOP [WHO])
READ:UNKNOWN

TO: Neera Tanden (CN=Neera Tanden/OU=WHO/O=EOP @ EOP [WHO])
READ:UNKNOWN

TO: Jennifer L. Klein (CN=Jennifer L. Klein/OU=OPD/O=EOP @ EOP [OPD])
READ:UNKNOWN

TEXT:
could one of you deal with this? thanks.
----- Forwarded by Elena Kagan/OPD/EOP on 08/24/98 01:46
PM -----

Paul J. Weinstein Jr.
08/24/98 12:39:48 PM

Record Type: Record

To: See the distribution list at the bottom of this message
cc: Elena Kagan/OPD/EOP
Subject: Women's Accomps Document - Updated

Please review and give your comments to Robin.
----- Forwarded by Paul J. Weinstein Jr./OPD/EOP on
08/24/98 12:38 PM -----

Robin J. Bachman
08/24/98 10:55:35 AM
Record Type: Record

To: See the distribution list at the bottom of this message
cc: Paul J. Weinstein Jr./OPD/EOP
Subject: Women's Accomps Document - Updated

Attached please find a revised version of our Women's accomplishments doc
(it was last updated in January). I haven't heard back from DPC. The
Women's Office has a big meeting tomorrow and would really like to
distribute an updated version.

Please get back to me today if you have any changes.

Thanks!

Robin
66237
----- Forwarded by Robin J. Bachman/WHO/EOP on 08/24/98
10:49 AM -----

Robin J. Bachman

08/12/98 07:06:16 PM

Record Type: Record

To: Paul J. Weinstein Jr./OPD/EOP, Jonathan Orszag/OPD/EOP, Ann F. Lewis/WHO/EOP
cc: Kelley L. O'Dell/WHO/EOP, Thomas D. Janenda/WHO/EOP, Ruby Shamir/WHO/EOP
Subject: Women's Accomps Document - Updated

Here is an updated version of a Womens' Accomplishments document we distributed in January. Please look it over. I'd like, if possible, to get edits by midday Friday. Additions are fine, but I don't want to add too much more. Suggested deletions are OK, too.

Paul: Do you mind running it by your guys, or should I go to the various teams individually?

We (research) are also revising the African American, Latino and Asian sheets. They will be forwarded to you hopefully by COB Friday, more likely next week.

Thanks. If you have questions, please call.

Robin
66237

Message Sent

To: _____
Sarah A. Bianchi/OPD/EOP
Leanne A. Shimabukuro/OPD/EOP
Jose Cerda III/OPD/EOP
Jonathan H. Schnur/OPD/EOP
Tanya E. Martin/OPD/EOP
Jennifer L. Klein/OPD/EOP

Message Sent

To: _____
Jennifer L. Klein/OPD/EOP
Nicole R. Rabner/WHO/EOP
Neera Tanden/WHO/EOP
Leanne A. Shimabukuro/OPD/EOP
Michael Cohen/OPD/EOP
Tanya E. Martin/OPD/EOP
Christopher C. Jennings/OPD/EOP
Sarah A. Bianchi/OPD/EOP

===== ATTACHMENT 1 =====
ATT CREATION TIME/DATE: 0 00:00:00.00

PRESIDENT CLINTON AND VICE PRESIDENT GORE: *Supporting Women and Families*

EXPANDING ECONOMIC OPPORTUNITIES:

- **Protecting Families.** The Family & Medical Leave Act (FMLA) enables workers to take up to 12 weeks unpaid leave to care for a new baby or ailing family member without jeopardizing their job. Approximately fifteen million workers have already benefited from FMLA since its enactment. The President also proposed expanding the Family & Medical Leave Act to allow workers up to 24 hours per year of unpaid leave for parent-teacher conferences or routine medical care for a child.
- **Cutting Taxes for 15 Million Working Families** by extending the Earned Income Tax Credit.
- **Increasing the Minimum Wage from \$4.25 to \$5.15**, giving 6 million women a raise.
- **Narrowing the Wage Gap.** Last year, the median earnings of women working full-time increased 2.4 percent. In 1996, the median earnings of women represented 74 percent of the median earnings for men, the narrowest gap ever.
- **Fighting for Paycheck Equity.** Called on Congress to pass legislation to strengthen laws prohibiting wage discrimination.
- **Signed the Bipartisan Workforce Investment Act** reforming America's job training system for the 21st Century.
- **Highest Home Ownership Rate in History.** There are more than 68 million American families who own homes, more than 6 million new homeowners since the President took office. Women's home ownership is increasing at a faster rate than the rest of the country -- up five percent since the first quarter of 1994.
- **Increasing Pension Security.** Fought for legislation that has expanded pension coverage, made pensions more secure for 40 million American workers and retirees, and simplified pension plan administration. Promoting new efforts to encourage retirement savings.
- **Saving Social Security First.** In 1999, nearly 60 percent of all Social Security beneficiaries will be women. President Clinton is committed to save Social Security for the 21st Century and has urged that budget surpluses should be reserved pending Social Security reform.

MAKING OUR HOMES AND COMMUNITIES SAFER:

- **Putting 100,000 More Police on the Streets.** Because of President Clinton's Crime Bill, over 77,000 officers are -- or soon will be -- keeping our neighborhoods and communities safe, on the way to 100,000. And violent crime has dropped six years in a row - the longest period of decline in 60 years.
- **Signed the Assault Weapons Ban** into law as well as **the Brady Bill**, which has already kept handguns away from 250,000 felons, fugitives and individuals under restraining orders related to domestic harassment. The President also signed into law an extension of the Brady Law, which prohibits anyone convicted of a domestic violence offense --

- misdemeanor or felony -- from owning or possessing a firearm.
- **Signed Megan's Law** allowing community-notification of sex offenders.
- **Championed the Violence Against Women Act**, the cornerstone of the President's efforts to fight domestic violence, and created an office at the Department of Justice dedicated to combating violence against women.
- **More than Tripled Funding to Domestic Violence Shelters** and instituted new penalties against men who stalk, threaten or abuse women across state lines.
- **Established Nationwide 24-Hour Domestic Violence Hotline.** The hotline (1-800-797-SAFE) provides immediate crisis intervention, counseling and referrals for those in need. Since the hotline opened, there have been 229,000 calls -- averaging 8,000 calls a month -- from all 50 States, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands.

INVESTING IN EDUCATION AND TRAINING:

- **Largest Investment in Education in 30 Years.** Maintaining his longtime commitment to education, the President enacted the largest investment in education in 30 years -- and the largest investment in higher education since the G.I. Bill -- by signing the 1997 Balanced Budget Act.
- **Providing Early Education to More than 830,000 Children with Head Start.** 200,000 more children are enrolled in Head Start today than in 1992.
- **Promoting National Service** and educational opportunities through AmeriCorps.
- **Teaching Every Child to Read by the 3rd Grade.** The America Reads Initiative will provide tutors after school, improve teaching, and help parents help their children learn to read.
- **Striving for Excellence with National Education Standards.** Seeking high national standards for all students, the President has proposed a first-ever national test in 4th grade reading and 8th grade math.
- **Expanding Choice and Accountability in Public School.** Supported increase of public charter schools, from only one charter school in the nation in 1993 to more than 1,000 charter schools this year.
- **Fighting for Critical Education Investments.** The President has called on Congress to pass critical education priorities included in his FY99 Budget that include initiatives to recruit quality teachers, rebuild crumbling schools and reduce class size.
- **Fought for passage of education tax breaks to promote lifelong learning.** Representing the largest single increase in higher education since the G.I. Bill, the Balanced Budget includes a \$1,500 Hope Scholarship to make the first two years of college universally available, and a 20-percent tuition tax credit for college juniors, seniors, graduate students, and working Americans pursuing lifelong learning.

CARING FOR OUR CHILDREN:

- **Imposed Strict Measures to Keep Cigarettes out of the Hands of Our Children** by restricting youth-targeted advertising; and the FDA made 18 the minimum age to purchase tobacco products nationwide, requiring photo I.D.s for anyone under the age of 27. Fighting to enact comprehensive tobacco legislation.
- **Took Steps to Ensure Children Have Safe Medications.** Unveiled an FDA regulation that protects children by requiring manufacturers to study appropriate dosage levels of

drugs for pediatric populations.

- **Held First-Ever White House Conference on Child Care and White House Conference on Early Child Development and Learning.** In April 1997, the President and First Lady held the White House Conference on Early Child Development and Learning to highlight the benefits of early nurturing by parents. And in October 1997, the White House Conference on Child Care began a dialogue on the child care challenges facing parents today -- availability, affordability, and assuring safety and quality.
- **Proposed the Largest Single Investment in Child Care in the Nation's History.** Between FY93 and FY97, federal funding for child care increased by nearly 79 percent, providing child care services for over one million children. The President's new \$20 billion child care proposal will double the number of children receiving child care subsidies to more than two million and increases tax credits for three million working families to help them pay for child care.
- **Extended Health Care to Millions of Children with the Children's Health Initiative,** the single largest investment in Health Care for children since 1965. The President fought to ensure that the Balanced Budget included \$24 billion to provide meaningful health care coverage to millions of uninsured children.
- **Fought for and Won \$500 Child Tax Credit for 27 Million Families with 45 Million Children under Age 17.** Thirteen million children from families with income below \$30,000 will receive the child tax credit as a result of the President's efforts.
- **Signed Landmark Adoption and Safe Families Act.** This law will help thousands of children waiting in foster care move more quickly into safe and permanent homes.
- **Signed the Comprehensive Childhood Immunization Initiative.** Thanks to President Clinton, immunization rates among two-year-olds have reached historic highs.
- **Launched New Strategies to Reduce the High Rate of Teen Pregnancies.** Teen (aged 15 to 19 years) births have fallen six years in a row, by 12 percent from 1991 to 1996.

IMPROVING OUR NATION'S HEALTH:

- **Protected and Strengthened Medicare Benefiting the 22 Million American Women Enrolled in Medicare.** The Balanced Budget Act extended the life of the Medicare Trust Fund until at least 2010; expanded choices in health plans; and provided beneficiaries new preventive benefits, including more affordable annual mammograms for all beneficiaries, cervical cancer screening, and tests to help detect osteoporosis. The President has also put forth a new proposal that will help older women. The new options will help Americans ages 55 to 65 to access health insurance, including buying into Medicare.
- **Increased Funding for Breast Cancer Research.** Since the President took office, funding for breast cancer research, prevention and treatment has nearly doubled, from about \$276 million in FY 1993 to \$513 million in the President's FY 1998 budget. Implemented the Mammography Quality Standards Act to ensure the quality of mammograms; women can find a certified mammography facility by calling 1-800-4-CANCER.
- **Providing Greater Control and Protection with the Patients' Bill of Rights.** The President is calling on Congress to pass Federally enforceable consumer health care protections that include: guaranteed access to needed health care specialists including direct access to an OB-GYN; access to emergency room services when and where the need arises; continuity of care protections to ensure that patients' care will not abruptly

change if their provider is dropped; access to a timely internal and independent external appeals process for consumers to resolve their differences with their health plans; a limit on financial incentives to doctors to limit care and assurances that doctors and patients can openly discuss treatment options. Women are particularly vulnerable without these health care protections because they are greater users of health care services, they make three-quarters of the health care decisions for their families, and they have specific health care needs that are directly addressed by a patients' bill of rights.

- **Preventing Discrimination Based on Genetic Information Both by Health Plans and Employers.** Urging Congress to pass bipartisan legislation to prohibit health plans from inappropriately using genetic screening information to deny coverage, set premiums, or to distribute confidential information. The President also has supported legislation that ensures that employers do not use genetic information to discriminate against employees.
- **Fought for Greater Health Security for America's Families.** The President signed into law the Health Insurance Portability and Accountability Act which helps millions of Americans who move from one job to another, who are self-employed, or who have pre-existing medical conditions keep their health insurance.
- **Endorsed Legislation That Would Ban Drive-thru Mastectomies,** allowing women to stay in the hospital at least 48 hours following a mastectomy.
- **Ended Drive-Thru Deliveries.** Proposed and signed into law legislation requiring insurers to cover at least 48 hours of a post-natal hospital stay (72 hours for a Cesarean).

PROMOTING REPRODUCTIVE HEALTH SERVICES FOR WOMEN:

- **Reversed the "Gag Rule"** limiting the information federally funded family planning clinics could give to women.
- **Increased Funding for Title X.** The President's FY99 proposal will increase Title X Family Planning grants by \$15 million -- a 46 percent increase since FY92.
- **Signed the Freedom of Access to Clinic Entrances Act,** establishing a safety-zone around women's health clinics.

GENERATING MORE BUSINESS OPPORTUNITIES FOR WOMEN:

- **Women Are Starting Businesses at Twice the Rate of All Businesses.** Women own nearly 40 percent of all firms in the U.S. These eight million women-owned firms employ 18.5 million—one in every five U.S. workers—and contribute \$2.3 trillion to the economy. The Small Business Administration's Office of Women's Business Ownership is working to foster this growth.
- **Tripled the Number of Small Business Loans to Women Entrepreneurs.** Between 1993 and 1997 the SBA approved nearly 50,000 loans to women entrepreneurs under the 7(a) and 504 loan programs. Last year alone, the Small Business Administration granted more than 10,000 loans, worth \$1.67 billion, to women small business owners, triple the number of loans granted in 1992.

WOMEN AS PARTNERS IN DECISION MAKING:

- **Appointed More Women than Any Other President** -- 41 percent of Administration appointees are women.
- **Women Hold 29 Percent of the Top Positions** -- 29 percent of the positions requiring Senate confirmation (PAS) are held by women. Additionally,
 - 34 percent of the presidential appointments, including boards and commissions, are held by women.
 - 39 percent of non-career Senior Executive Service positions are held by women.
 - 58 percent of Schedule C positions are held by women.
- **Appointed the First Women Ever to Serve as Attorney General, Janet Reno, and Secretary of State, Madeleine Albright.** Including the Attorney General and Secretary of State, women make up 27 percent of the Clinton Cabinet: Alexis Herman, Secretary of Labor; Donna Shalala, Secretary of Health and Human Services; Carol Browner, Administrator of the Environmental Protection Agency; Janet Yellen, Chair of the Council of Economic Advisors; and Charlene Barchevsky, United States Trade Representative.
- **30 Percent of All of the President's Judicial Nominees Are Women.**
- **Nominated the Second Woman to Serve on the Supreme Court.** During his first year in office, President Clinton nominated Ruth Bader Ginsburg to the United States Supreme Court. Justice Ginsburg is only the second woman to serve on the nation's highest court.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME:24-AUG-1998 14:23:36.00

SUBJECT: Agenda

TO: Maureen T. Shea (CN=Maureen T. Shea/OU=WHO/O=EOP @ EOP [WHO])

READ:UNKNOWN

TEXT:

you bet; please call laura to put something on my schedule. thanks.

----- Forwarded by Elena Kagan/OPD/EOP on 08/24/98 02:23

PM -----

Maureen T. Shea

08/24/98 02:02:06 PM

Record Type: Record

To: Elena Kagan/OPD/EOP

cc:

Subject: Agenda

Would you be free this week to discuss fall agenda for women - I'm trying to put together a calendar of events/opportunities and your input would be very helpful. Any day but Tuesday is good for me. Many thanks - I'm on X67396.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME: 24-AUG-1998 17:30:18.00

SUBJECT: Race Report -- CR enforcement

TO: Julie A. Fernandes (CN=Julie A. Fernandes/OU=OPD/O=EOP @ EOP [OPD])

READ: UNKNOWN

TEXT:

good.

----- Forwarded by Elena Kagan/OPD/EOP on 08/24/98 05:30
PM -----

Julie A. Fernandes
08/24/98 05:24:13 PM

Record Type: Record

To: Elena Kagan/OPD/EOP

cc: Laura Emmett/WHO/EOP

Subject: Race Report -- CR enforcement

Elena,

The PIR (Scott & Edley) have asked that I be involved in the working group for CR enforcement (for the President's report). I have agreed and have asked to be included in the work in the other subject areas as well

Julie

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME:25-AUG-1998 16:30:12.00

SUBJECT: weekly item

TO: Kevin S. Moran (CN=Kevin S. Moran/OU=WHO/O=EOP @ EOP [WHO])

READ:UNKNOWN

TEXT:

===== ATTACHMENT 1 =====

ATT CREATION TIME/DATE: 0 00:00:00.00

TEXT:

Unable to convert ARMS_EXT:[ATTACH.D55]MAIL40903273E.226 to ASCII,
The following is a HEX DUMP:

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80726576696577696E6780746865CF4E6174696F6E616C8041636164656D79806F668053636965
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DPC -- Food Safety Council. Secretaries Glickman and Shalala and Director Lane briefed the press this afternoon on the Executive Order you signed to establish a new Council on Food Safety. As you know, the Council is charged with improving coordination among the various federal agencies that deal with food safety issues by developing a comprehensive food safety plan and a unified food safety budget. The Council also is charged with reviewing the National Academy of Science's recent recommendation that Congress pass legislation establishing a single food safety agency. Consumer groups generally praised the Executive Order. For example, the Center for Science in the Public Interest said that the Council "represents an important improvement of the existing food safety system," and the Safe Food Coalition stated that "the creation of the Council is a productive step toward improving the safety of America's food supply." At the same time, all these groups called on the Council to support the NAS's call for legislation establishing a single food safety agency.

[illegible]

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RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME:27-AUG-1998 10:29:31.00

SUBJECT: Re: Equal Pay MOU

TO: Mary L. Smith (CN=Mary L. Smith/OU=OPD/O=EOP @ EOP [OPD])

READ:UNKNOWN

TEXT:

and do the women's groups know why we're holding it up?

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME: 27-AUG-1998 10:25:37.00

SUBJECT:

TO: Sarah A. Bianchi (CN=Sarah A. Bianchi/OU=OPD/O=EOP @ EOP [OPD])

READ: UNKNOWN

TEXT:

please remember to get me the new draft of the letter ASAP. thanks.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME:27-AUG-1998 10:28:58.00

SUBJECT: Re: Equal Pay MOU

TO: Mary L. Smith (CN=Mary L. Smith/OU=OPD/O=EOP @ EOP [OPD])

READ:UNKNOWN

TEXT:

any new news on this?

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME:27-AUG-1998 10:13:29.00

SUBJECT:

TO: Michael Cohen (CN=Michael Cohen/OU=OPD/O=EOP @ EOP [OPD])

READ:UNKNOWN

TEXT:

I like the new paper. who do we need to get it around to?

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME:27-AUG-1998 11:40:39.00

SUBJECT: Re: next steps

TO: Edward W. Correia (CN=Edward W. Correia/OU=WHO/O=EOP @ EOP [WHO])

READ:UNKNOWN

TEXT:

me either. maybe civil rights work for edley's book???

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME:28-AUG-1998 15:04:14.00

SUBJECT:

TO: Jose Cerda III (CN=Jose Cerda III/OU=OPD/O=EOP @ EOP [OPD])

READ:UNKNOWN

CC: Bruce N. Reed (CN=Bruce N. Reed/OU=OPD/O=EOP [OPD])

READ:UNKNOWN

TEXT:

also martha foley suggested that we get McCaffreu engaged on this, which seems to me a good idea.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME:28-AUG-1998 15:03:33.00

SUBJECT: approps battles

TO: Jose Cerda III (CN=Jose Cerda III/OU=OPD/O=EOP @ EOP [OPD])

READ:UNKNOWN

TO: Michael Cohen (CN=Michael Cohen/OU=OPD/O=EOP @ EOP [OPD])

READ:UNKNOWN

CC: Bruce N. Reed (CN=Bruce N. Reed/OU=OPD/O=EOP [OPD])

READ:UNKNOWN

TEXT:

At a meeting on appropriations priorities today, Kack suggested (and I agreed) that we should try to think of some fallback positions on (1) ed op zones and (2) drug testing initiative. On zones, jack thinks the problem will be getting an appropriation for which we currently have no authorizing legislation; he suggests that we try to figure out how to do zones (or at least some part of it) within the context of a program that already is authorized. On drug testing, Jack suggests that we come up with some way to get this through the current block grant -- e.g., an earmark or a preferred use.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME:28-AUG-1998 13:37:01.00

SUBJECT: Re:

TO: Phillip Caplan (CN=Phillip Caplan/OU=WHO/O=EOP @ EOP [WHO])

READ:UNKNOWN

TEXT:

jeanne works for gene.

[illegible]

August 22, 1998

MEMORANDUM FOR THE PRESIDENT

THROUGH: Erskine Bowles

FROM: Bruce Reed
Elena Kagan

SUBJECT: Tobacco Idea

Dick Scruggs called us yesterday with an idea for how to achieve our goals on tobacco without legislation. We have discussed this idea with Erskine, and all of us believe that it is very interesting. If you agree that Scruggs's suggestion is worth pursuing, Erskine will take the steps necessary to do so. Until he does, we should not raise this idea with anyone else.

Scruggs proposes that the federal government enter into a consent decree with the tobacco companies to settle our claims for Medicare costs. As a matter of mechanics, we probably would do this by filing two documents simultaneously with a court: a complaint against the companies and a proposed settlement agreement.

Under Scruggs's proposed consent decree, the companies would make the payments called for in the June 20th settlement agreement -- i.e., \$368 billion plus capped industry-wide lookbacks. About \$200 billion of this amount would go to states settling their own suits against the companies, with the remainder going to the federal government. Any state that wished to continue its suit against the companies could do so, but the state's share of the money then would revert to the federal government. Scruggs had no view on whether the states should have to use some portion of their money for specified purposes (e.g., child care). He did note that the federal government would have to leave the full \$200 billion with the states, rather than seek to recapture its usual share of Medicaid recoveries.

In addition to containing these monetary provisions, the consent decree would require the companies to drop their legal challenge to the FDA rule and to accept the FDA's assertion of jurisdiction over tobacco products. The decree also would mandate that the companies adhere to all the youth access and advertising restrictions contained in the June 20th settlement agreement.

The consent decree of course could not give the companies the liability protections contemplated in the June 20th agreement; for that, an act of Congress is necessary. Scruggs suggests, however, that the decree contain some kind of set-off or credit for punitive damages. Under the scheme he proposes, a company could subtract from its required payment to a state any

punitive damages awarded against the company in that state's courts, up to the full amount of the required payment. Scruggs believes that the states will go along with this provision, even though it appears to put everything they get out of the settlement at some risk (at least if their courts award punitive damages).

Scruggs also proposes that the consent decree give the settling companies some kind of protection against new entrants to the tobacco market (or existing companies with tiny market shares). This protection, according to Scruggs, is necessary to alleviate the fear of the companies that agreeing to this settlement will allow new companies to undercut them. Although Scruggs is uncertain about precisely how to provide this protection, he suggests that the FDA agree to regulate settling companies somewhat differently from other companies -- for example, by agreeing not to ban products manufactured by settling companies, but retaining authority to ban products manufactured by all others.

Erskine and we believe that as outlined here and putting aside all legal questions, the settlement is deficient in two respects. First, the settlement does not include any protection for farmers. We could solve this problem by insisting that the companies agree to purchase a set amount of tobacco leaf each year from American farmers. Second, the settlement seems slightly underfunded. We need to get something -- even if not much -- more than the original \$368 billion (perhaps the \$428 in Senator Hatch's bill) to sell this settlement as a huge victory.

Even more important, we will have to address a number of legal issues before we can enter into this kind of settlement. First, we will have to figure out a legal way of giving about \$200 billion in settlement monies to the states; this provision potentially conflicts with the federal government's obligation to place legal awards in the U.S. Treasury for later appropriation by Congress or with the federal government's obligation to recoup a portion of state Medicaid recoveries. Second, we will have to find a sure way to protect the FDA rule; the settling companies' agreement to drop their suit is insufficient if other parties (e.g., retailers, advertisers, other manufacturers) can continue the suit, or bring a very similar suit the next morning. Third, we will have to inspect very closely any proposals to give a competitive advantage to settling companies, in light of both our antitrust policies and our regulatory objectives.

All that said, we think this approach presents us with an exciting opportunity. According to Scruggs, key Wall Street analysts have told him that the industry might well be interested in this kind of deal. (Scruggs claims not to have talked with industry officials.) We think you should give Erskine the go-ahead to send out some feelers.

Scruggs Proposal

What the companies give:

- \$368+ billion (\$428?), of which about \$200 billion goes to states (less if some states opt out); money to states is free and clear of all federal recoupment claims
- Industry-wide lookbacks
- All advertising and access restrictions in June 20th agreement
- Withdrawal of legal challenge to FDA rule; action to prevent other parties from continuing current suit or bringing new one (but how?)
- Undetermined protection for or payment to tobacco farmers

What the companies get:

- Settlement of federal suit and state suits (unless state opts out of money)
- Credit for punitive damages against payments to states -- e.g., if Mississippi court grants private plaintiff \$10 million in punitive damages, companies pay \$10 million less to Mississippi
- Undetermined market protection against non-settling companies (including new entrants) -- e.g., distinctions in way FDA regulates settling and non-settling parties

August 26, 1998

MEMORANDUM FOR ERSKINE BOWLES

FROM: Elena Kagan

SUBJECT: Tobacco

Attached is a one-pager to give to the Attorney General. As you can see, I have labeled the proposed agreement the "Scruggs Proposal"; if you would prefer me to describe it differently, please let me know.

Two further thoughts occurred to me as I was writing up the one-pager. First, we must figure out whether our trade obligations prevent us from entering into certain kinds of agreements to protect farmers (e.g., an agreement by the companies to buy a set amount from American farmers). Second, we should consider whether the punitive damage set-off suggested by Scruggs will lead states to adopt laws prohibiting the award of punitive damages against tobacco companies, thus providing the companies with the protection they long have wanted against punitive damages.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME: 8-SEP-1998 13:58:56.00

SUBJECT: Re: DETAILS FOR TOMORROW'S DATE ---- to get our groove back...

TO: Minyon Moore (CN=Minyon Moore/OU=WHO/O=EOP @ EOP [WHO])

READ:UNKNOWN

TEXT:

sorry i missed this; i had he good luck to be out all last week. i'd love to be included when you next meet.

[illegible]

Welfare Caseload Analysis

9/4/98

	<u># of recipients (in millions)</u>	<u># change from prior mo</u>	<u>% change from prior mo</u>	<u># change from prior yr</u>	<u>% change from prior yr</u>
Jan 96	12.877				
Aug 96	12.202				
Oct 96	11.895				
Jan 97	11.36			-1.517	-11.8%
Feb 97	11.262	-0.098	-0.9%		
Mar 97	11.156	-0.106	-0.9%		
April 97	10.969	-0.187	-1.7%		
May 97	10.748	-0.221	-2.0%		
June 97	10.494	-0.254	-2.4%		
July 97	10.258	-0.236	-2.2%		
Aug 97	9.995	-0.263	-2.6%	-2.207	-18.1%
Sep 97	9.804	-0.191	-1.9%		
Oct 97	9.668	-0.136	-1.4%	-2.227	-18.7%
Nov 97	9.447	-0.221	-2.3%		
Dec 97	9.345	-0.102	-1.1%		
Jan 98	9.132	-0.213	-2.3%	-2.228	-19.6%
Feb 98	9.026	-0.106	-1.2%	-2.236	-19.9%
Mar 98	8.91	-0.116	-1.3%	-2.246	-20.1%
April 98	8.758	-0.152	-1.7%	-2.211	-20.2%
May 98	8.572	-0.186	-2.1%	-2.176	-20.2%
June 98	8.38	-0.192	-2.2%	-2.114	-20.1%

	Absolute	% change
Drop Mar to June 97	-0.662	-5.93%
Drop Mar to June 98	-0.53	-5.95%
Difference	-20%	0.24%

USA Today used absolute change, which makes no sense when base is falling.
In fact, rate of change has held steady at nearly 6%, and has actually accelerated slightly (by one quarter of a percent).

Withdrawal/Redaction Marker

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
002. email	Elena Kagan to Laura Emmett re: personal (4 pages)	09/08/1998	Personal Misfile

COLLECTION:

Clinton Presidential Records
Automated Records Management System [Email]
OPD ([From Elena Kagan])
OA/Box Number: 250000

FOLDER TITLE:

[8/22/1998 - 9/27/1998]

2009-1006-F
ry940

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME: 9-SEP-1998 08:51:05.00

SUBJECT: INS reform -- legislative strategy

TO: Maria Echaveste (CN=Maria Echaveste/OU=WHO/O=EOP @ EOP [WHO])

READ:UNKNOWN

CC: Julie A. Fernandes (CN=Julie A. Fernandes/OU=OPD/O=EOP @ EOP [OPD])

READ:UNKNOWN

TEXT:

we all decided that veto threat language was not appropriate.

----- Forwarded by Elena Kagan/OPD/EOP on 09/09/98 08:50
AM -----

Julie A. Fernandes
09/08/98 08:18:49 PM

Record Type: Record

To: Maria Echaveste/WHO/EOP, Steven M. Mertens/OMB/EOP, Michael
Deich/OMB/EOP

cc: Elena Kagan/OPD/EOP, Marjorie Tarmey/WHO/EOP

Subject: INS reform -- legislative strategy

Maria,

Elena held a meeting with Peter Jacoby, Michael Deich, Steve M., Ingrid Schroeder and Chuck Kieffer this afternoon to decide our legislative strategy re: INS reform. We decided that Peter would ask Justice to write a letter (from the AG) strongly opposing the Rogers legislation for two reasons: (1) the appropriations process is not the right vehicle for doing this; we have made good progress toward a bi-partisan bill and we should pursue that; etc.; and (2) the bill has substantive problems; e.g., it needs to include an equivalent office for immigration benefits and someone to coordinate the two halves of immigration policy. According to Peter, the mark-up for the Rogers bill will likely be put off until next week, but we still want DOJ to draft the letter as soon as they can. Also, Peter is going to suggest to DOJ that Eric Holder make calls to some Republican members on the House Judiciary committee, asking them to support not reporting the Rogers bill out of committee.

julie

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME: 9-SEP-1998 08:54:26.00

SUBJECT: POTUS meeting

TO: Bruce N. Reed (CN=Bruce N. Reed/OU=OPD/O=EOP [OPD])

READ:UNKNOWN

TEXT:

fyi. this seems ridiculous to me.

----- Forwarded by Elena Kagan/OPD/EOP on 09/09/98 08:54
AM -----

"Christopher Edley, Jr." <edley @ law.harvard.edu>

09/08/98 05:27:30 PM

Record Type: Record

To: Elena Kagan/OPD/EOP, Sidney Blumenthal/WHO/EOP

cc: Maria Echaveste/WHO/EOP

Subject: POTUS meeting

Last I heard, it is still likely that we will have a small group discussion with POTUS concerning the race book some time this Friday. That could change, but

We should get together to share ideas about how best to use that time. Maria is probably traveling with POTUS tomorrow (Wednesday), but the three of us could try. Would late afternoon or early evening work? That way, if we agree on some additional piece of paper, I'd have time to write it on Thursday.

Withdrawal/Redaction Marker

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
003. email	Elena Kagan to Laura Emmett re: personal (7 pages)	09/09/1998	Personal Misfile

COLLECTION:

Clinton Presidential Records
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OPD ([From Elena Kagan])
OA/Box Number: 250000

FOLDER TITLE:

[8/22/1998 - 9/27/1998]

2009-1006-F
ry940

RESTRICTION CODES

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C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

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- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
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- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME:10-SEP-1998 19:33:10.00

SUBJECT: weekly report

TO: Laura Emmett (CN=Laura Emmett/OU=WHO/O=EOP @ EOP [WHO])

READ:UNKNOWN

TEXT:

----- Forwarded by Elena Kagan/OPD/EOP on 09/10/98 07:33 PM -----

Michael Cohen

09/10/98 06:33:57 PM

Record Type: Record

To: Elena Kagan/OPD/EOP

cc:

Subject: weekly report

Charter schools legislation. The Administration is continuing discussions with Senate staff to reach agreement to bring a charter school bill to the Senate floor. The bill was approved by full committee with bipartisan support last month, and is generally similar-- with a few important differences that would need to be resolved in conference -- to a bipartisan charter school bill approved by the House last year. The final obstacle to approval by the full Senate appears to be a demand from Senator Harkin permitting a small portion of funds from the charter school program to support "innovative" non-charter schools, in states that do not permit charter schools. Senate Republicans (and Senator Kennedy's office) oppose this provision because it undermines one purpose of the bill--to provide incentives to states to enact charter schools legislation. In order to keep the bill moving forward, we are attempting to broker a compromise, either by helping Sen. Harkin find ways of directing funds to innovative schools outside the framework of charter schools legislation, or by including in the charter schools bill a small demonstration program to support schools with most features of charter schools (i.e., a public school of choice with flexibility and a performance contract) but that are not located in a state with a charter school law. It is unclear whether either Harkin or the Republicans will accept this compromise.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME:10-SEP-1998 19:32:42.00

SUBJECT: Re: Leanne Shimabakuro

TO: Paul J. Weinstein Jr. (CN=Paul J. Weinstein Jr./OU=OPD/O=EOP @ EOP [OPD])

READ:UNKNOWN

TEXT:

ok with me.

[illegible]

MEMORANDUM FOR ELENA KAGAN AND SALLY KATZEN

FROM: JULIE FERNANDES AND CECILIA ROUSE

SUBJECT: ASSESSMENT OF H-2A "IDEAS INVENTORY"

DATE: April 24, 2009

Attached is our assessment of the positions of USDA and DOL regarding the proposals put forth in DOL's "ideas inventory." The shaded boxes indicate important proposals for which there is agency disagreement and thus should be discussed at today's meeting. We have also attached a list of the current program requirements that includes definitions of the most important terms.

In order to better understand the agencies' positions, it is useful to understand the underlying policy tensions. Growers see themselves as having a choice between three categories of workers: legal U.S. workers, illegal workers, and H-2A workers. Which category they draw from is almost exclusively determined by total cost. For example, if the total cost of hiring a U.S. worker (including wages, taxes, housing, etc.) is higher than the total cost of hiring an H-2A worker, the grower will hire the H-2A worker. Therefore, the total compensation offered by the H-2A program becomes the effective total compensation ceiling for U.S. workers. In addition, the presence of large numbers of illegal farmworkers distorts the labor market such that the growers' response to an inability to find sufficient legal U.S. workers is to hire illegal workers, rather than increase wages or improve working conditions. Thus, though we may want to require fair wages and working conditions in the H-2A program, if the cost of using the program is too high, the growers will hire undocumented workers.

USDA's goal is to provide a steady, reliable source of farmworkers for U.S. growers. USDA believes that the domestic labor force can never completely satisfy the labor needs of agriculture, particularly during peak times, and therefore there will always be a need for temporary foreign agricultural workers. In a world in which the INS is increasingly cracking down on the employment of undocumented workers, the USDA (and the growers) would prefer that the foreign workers that they employ be authorized to work. Their goal is thus to set a wage (or total compensation) floor that is low enough that growers will readily use the H-2A program (rather than hire undocumented workers), but that is high enough to continue to attract existing U.S. farmworkers. However, they believe that an H-2A program that would set the wage (or total compensation) floor high enough to attract many more U.S. workers would drive growers into the illegal labor market.

DOL is concerned that a low wage (or total compensation) floor becomes a low ceiling for U.S. workers and therefore hurts these already impoverished workers. They are not as convinced that the domestic labor force could never satisfy growers needs at a reasonable wage; rather, they argue that agricultural wages have been kept artificially low because of the large presence of undocumented workers. Labor believes that if agricultural wages were allowed to rise, additional

U.S. workers would be willing to work in agriculture. They also assert that we can do a better job of facilitating matches between workers and employers that would give domestic farm workers more stable employment and growers access to a steady supply of workers.

As you read through the following list of proposals, you will notice that in many areas (e.g., wages, housing, transportation) the issue is whether the proposal increases the total cost to the employer or shifts those costs to the government or the farmworker. USDA generally opposes reforms that would increase grower costs. The Labor Department generally opposes reforms that transfer costs to the government or the farmworker, and favors reforms that aim at improving labor conditions or wages for U.S. and foreign farmworkers. Because the focus is on total costs (with wages and housing being the most significant areas of concern) we cannot decide on individual reform components in isolation.

Requirements (and Definitions) under the Current H-2A Program

- **Recruitment:** The agricultural employer must engage in independent positive (i.e., active) recruitment of U.S. workers, including newspaper and radio advertising in areas of expected labor supply. Such recruitment must be at least equivalent to that conducted by non-H-2A agricultural employers to secure U.S. workers.
- **Wages:** Employers must pay H-2A workers the “**adverse effect wage rate**” (AEWR), the applicable prevailing wage rate, or the statutory minimum wage rate, whichever is higher. The AEWRs are the minimum wage rates which the DOL has determined must be offered and paid to U.S. and H-2A workers, and they are established for each state. The region- or state-wide AEWR for all agricultural employment for which H-2A certification is being sought, is equal to the annual weighted average hourly wage rate for field and livestock workers (combined) for the region as published annually by the USDA.¹ The AEWRs are designed to prevent the employment of these nonimmigrant alien workers from adversely affecting the wages of similarly employed U.S. agricultural workers.
- **Housing:** The employer must provide free and approved housing to all workers, both foreign and domestic, who are not able to return to their residences the same day.
- **Meals:** The employer must provide either three meals a day to each worker or furnish free and convenient cooking/kitchen facilities. If meals are provided, then the employer may charge each worker a certain amount per day for these meals.
- **Transportation:** The employer is responsible for the following types of transportation for workers: 1) After a worker has completed fifty percent of the work contract period, the employer must reimburse the worker for the cost of transportation and subsistence from the place of recruitment to the place of work; 2) The employer must provide free transportation between any required housing site and the work site for any worker who is eligible for such housing; 3) Upon completion of the work contract, the employer must pay return transportation to the worker’s prior residence or transportation to the next job.
- **Workers’ Compensation Insurance:** The employer must provide Workers’ Compensation or equivalent insurance for all workers, both foreign and domestic.

¹Some 1998 AEWRs: California, \$6.87; Florida, \$6.77; Georgia, \$6.30; Hawaii, \$8.83; Kentucky, \$5.92; and Ohio, \$7.18.

- **Three-fourths Guarantee:** The employer must guarantee to offer each worker employment for at least three-fourths of the workdays in the work contract and any extensions. In applying this guarantee and determining any additional wages due, the following facts must be established: 1) The beginning and ending dates of employment; 2) The number of workdays between the established beginning and ending dates of the guarantee period; and 3) The hours of worktime for the guarantee. The guarantee is then established by computing seventy-five percent of the established total hours of work time in the contract period. Note that the employer may not count any hours offered on such days in which the worker refused or failed to work.
- **Fifty Percent Rule:** The employer must employ any qualified U.S. worker who applies for an available job until fifty percent of the contract period has elapsed.
- **Tools and Supplies:** The employer must furnish at no cost to the worker all necessary tools and supplies, unless it is common practice for the worker to provide certain items.
- **Labor Dispute:** The employer must ensure that the available job for which the employer is requesting H-2A certification is not vacant due to a strike or lockout.
- **Certification Fee:** A fee will be charged to an employer granted temporary alien agricultural labor certification. The fee is \$100, plus \$10 for each available job certified, up to a maximum fee of \$1,000 for each certification granted.
- **Farm Labor Contractors (Crewleaders):** A farm labor contractor is an organization or entity that either supervises, recruits, transports, houses, or solicits farm labor other than the owner of the work site. Bona fide registered farm labor contractors may be eligible to apply for and receive H-2A certification, although they generally deal with domestic laborers. Farm labor contractors would be required, as employers, to provide all the minimum benefits specified by the H-2A regulations, including the three-fourths guarantee and the fifty percent rule.

<u>Reform Proposal</u>	<u>WH</u>	<u>USDA</u>	<u>DOL</u>
Worker Recruitment			
Require "positive recruitment" of U.S. farmworkers by growers only in areas where DOL finds that there are a significant number of qualified workers willing to make themselves available for employment at the time and place	Y	okay	DOL implemented this administrative change.

needed.				
Count as "available" for employment only those U.S. workers who are identified by name, address, and SSN	Y	okay		DOL implemented this administrative change.
Post employers' H-2A job orders on America's job bank	Y	USDA would not oppose.		DOL proposal; requires job order simplification.
Strengthen the MSPA program of registering farm labor contractors to require bonding; allow H-2A employers to require bonding as a condition of employing a farm labor contractor.	Y	DOL and USDA agree to support this.		
Allow H-2A growers to include a bonding requirement for FLCs they employ.	Y	DOL and USDA agree to support this (essentially the same as the previous proposal).		
Eliminate the requirement that farm labor contractors must be used by H-2A growers if the use is the prevailing practice in the area.	N	USDA generally wants more flexibility for growers, however they are unlikely to strongly oppose DOL's opposition.		DOL strongly opposes because the goal is for the H-2A program to track prevailing practices in areas of labor protection.
Provide an exception from current program requirement to use FLCs for any FLC who has a demonstrated history of employing illegal workers or other serious labor abuses.	Y	USDA agrees.		DOL regulatory initiative.
Require use of FLCs as recruitment mechanism whenever use is "common" or "normal" (not prevailing) in an area.	N	USDA will likely oppose because grower regulations should involve the highest standard.		DOL generally supports prevailing practice. This is not likely an issue about which DOL will take a strong position.
Require payment of competitive rates for FLC services.				
Employment Eligibility Verification				
DOL work with Congress and other affected agencies to develop a reliable means of verifying individual's authorization to work as they are hired.	Y	USDA would likely agree because of their goal to decrease growers' dependence on undocumented workers as long as growers had increased access to H-2A workers.		DOL agrees.

Create a national employment eligibility verification system so that employers can check on the legal status of domestic workers who are hired during the H-2A process.	Y	INS currently has a pilot program to do just that which we support and has encouraged growers to participate in the pilot.	
Require growers using the H-2A program to use INS pilot employment eligibility verification system.	Y	USDA would likely agree as part of an overall package.	DOL would likely agree.
Growers only responsible for recruiting and hiring farm workers in the U.S. through the DOL-administered Registries (and contacting former employees); Registries are responsible -- and have only 14 days -- to locate, contact, verify employment eligibility, and refer U.S. workers to growers seeking foreign farm workers; failure to refer timely or to refer sufficient workers allows direct application for workers to Secy of State.	N	USDA likely supports this provision because it reduces the burden on employers.	DOL hates this provision because it leaves the burden of recruitment entirely to the Federal government.
Secy of State authorizes additional H-2A workers if Registry-referred workers fail to report; are "not ready, willing, able, or qualified" to do the work; or, abandon or are terminated from employment.	N	USDA likely supports this provision because it provides growers with quick access to H-2A workers if they have cannot recruit U.S. workers through the registry.	DOL would likely hate this provision because, again, it centralizes all recruitment through the Registry and absolves growers of any additional recruitment before applying for H-2A workers.
Pilot test new Registry of available U.S. farm workers; growers share responsibility for positive recruitment of U.S. farm workers.	Y	USDA would likely support a pilot of a mechanism to facilitate the hiring of U.S. workers for growers.	DOL supports a pilot of such a registry (as long as growers continue to share part of the responsibility for recruitment).
Require employers' "positive recruitment" to include: providing an 800 contact telephone number and accepting "collect" calls from worker job applicants; contacting other potential employers to link a series of job opportunities; and developing a long-term recruitment plan to reduce dependence on foreign guestworkers.	N	USDA would likely oppose such positive recruitment measures because it increases the costs to employers.	DOL would likely support these measures, but are unlikely to require that they be part of a final package.
H-2A workers covered by the MSPA, but disclosure only required at time of visa issuance.	N	USDA likely supports this measure.	DOL supports having H-2A workers covered by MSPA but likely believes that the workers should be informed of their rights when recruited rather than at the time of visa issuance (which could be after the worker has

				incurred significant costs).
DOL rulemaking regarding possible consolidation of agricultural job orders in the Interstate Clearance System.	Y	USDA agrees.	DOL agrees	
Productivity Standards				
H-2A employers allowed to set minimum production standards after a "3-day break-in period."	?			
Employer-established productivity standards and quality requirements should be permitted only if they are the prevailing practice among non-H-2A employers, are bona fide, objective, justifiable, fully disclosed and implemented on a fair and equitable basis.		USDA generally opposes any additional regulations or restrictions on growers and would therefore likely oppose this idea.	DOL would likely support this idea as it is aimed at protecting U.S. workers.	
Experience (and related) Requirements				
H-2A employers should be allowed to specify "agricultural experience" as a condition for hiring U.S. farm workers.		USDA would likely support because it ultimately gives the growers more flexibility in who they hire.	DOL would likely oppose arguing that it gives growers too much discretion for jobs that generally do not require substantial experience.	
Disallow job qualifications, experience and reference requirements unless they are the prevailing practice among non-H-2A employers and are otherwise job-related and bona fide.		USDA would likely oppose for the same reasons that they would support specifying "agricultural experience."	DOL would likely support for the same reasons they would oppose specifying "agricultural experience."	
Allow H-2A workers to move from one certified H-2A employer to another, with the final employer responsible for return transportation costs.	Y		According to DOL, this is current law.	
Prohibit H-2A job orders that consolidate seasons and different crops.		USDA would likely oppose because consolidation would potentially decrease costs to growers by allowing them to group together and reduce the number of individual	DOL would likely support because it protects U.S. farm workers by requiring growers to submit individual applications.	

		applications.	
Prohibit use of the H-2A program in designated labor surplus areas.	N	USDA may not disagree in theory but would likely be concerned that the designation of a labor surplus areas would not necessarily reflect the short-term labor needs of particular growers with particular crops.	DOL would support this in theory, however it would likely have concerns about how areas are designated.
Wages and Costs			
Revise H-2A regulations regarding the 3/4 guarantee to remove incentives to growers to overestimate the contract period.	Y	Agrees.	Agrees.
Consider applying the 3/4 guarantee incrementally during the contract period.	N	Oppose.	Opposes.
Eliminate the 3/4 guarantee	N	Doesn't like the 3/4 guarantee b/c wants growers not to have to pay workers if their crop is disappointing (less work in fact than they anticipated). However, they understand that this is a more generous rule than under the MSPA (the statute that governs non-H2A farmworkers) and thus agrees that this reform is no good.	Opposes the elimination of the 3/4 guarantee (b/c protects farmworkers by ensuring that the work that they are promised in the contract is provided, thus allowing them to make fairer judgments when choosing between jobs). However, not sure that 3/4 is a magic number.
Modify the 3/4 guarantee to allow H-2A growers to limit the contract period to "duration of crop activity" and terminate the contract period offered due to changes in market conditions.	N	Agree that effectively eliminates the 3/4 guarantee.	Agree that effectively eliminates the 3/4 guarantee.
Eliminate AEWR and instead require payment of 105% of prevailing wage for crop in the area.		Yes. They are in favor of eliminating the AEWR b/c it provides a wage higher than the prevailing wage for some H2A workers. USDA does not agree that the prevailing wage is depressed by the presence of illegals in the	No. The AEWR is calculated to compensate for the presence of illegals that depress the prevailing wage rate. It calculates the required wage as the state-wide average of all non-managerial farmworkers, thus dispersing the

		workforce, but does not object to a small sweetener to the prevailing wage to replace the AEWR (like the 105% proposed by Wyden)	<p>impact of illegals. If the wage is calculated based on 105% of prevailing, it will still be a depressed wage in those industries or areas where the presence of illegals is large. However, DOL agrees that the AEWR is a bit of an odd way to calculate, and that there is no magic to it.</p> <p>They want some way to calculate the wage that compensates both for the presence of illegals (wage depression) and for the fact that growers do not pay H2A workers FICA/FUDA (approx. 8%). AEWR may not be magic, but 105% of prevailing does not even get the wage = to that of non-H2A workers.</p>
Eliminate AEWR and require payment of the prevailing wage for the crop in the area.		USDA likes this option. They want the H2A wages to be the same as the prevailing wage in the crop and area. They dispute that wages are depressed b/c of the presence of illegals. In addition, they maintain that if the program requires a higher wage than what is being paid locally, the growers will not use the H2A program and will access the undocumented workforce.	<p>Labor hates this idea, for the reasons above. The wage paid to H2A workers should be a fair wage -- defined as one that compensates for the wage depression caused by the presence of illegals. Labor believes that growers should have to go to the U.S. market first, offer a fair wage and good conditions, and if not successful, access an H2A market that compels them to pay a fair wage under good conditions.</p>
Only require payment of federal minimum wage (not AEWR) as a "training wage" for inexperienced workers during a training period (in the K).		Another way to undercut the AEWR that USDA likes.	Another way to undercut the AEWR that Labor hates.
Require increases in piece rates to reflect increases in the AEWR.	Y	USDA would likely not like. This would raise the total wage cost.	Labor would like. Most farmworkers are paid by the piece, so a conversion of the piece rate to the AEWR is consistent with their desire to keep or strengthen the AEWR.
Prohibit H-2A employers from increasing productivity	Y	USDA would likely not like b/c this would raise the total wage cost and require farmers to	Labor would like this. It discourages the farmers from changing productivity levels in

requirements to offset increases in the AEW		set productivity levels early in the season and not allow conditions to change expectations.	ways designed to keep the wage low.
Change AEW methodology to set at 90th percentile of local market wage or 80th percentile of regional market wage.		They are generally opposed to any change that would increase the overall wage cost. However, they may be open to setting the wage at some modest percentage higher than the local prevailing wage. Thus, though these numbers are high, there may be room to work here.	Labor is generally in favor of calculations that result in a higher wage, though they see no magic in the AEW. The conflict with USDA would be over how high to set the percentile.
Apply AEW to sheepherders.	?	Opposed. Sheepherders are different.	They want more for the sheepherders.
Disallow any wage deductions by H-2A employers that reduce earnings below the highest required wage.		USDA would favor changes along these lines. They want to consider total cost of employing an H2A worker and compare that to total cost of hiring a non-H2A worker (legal or illegal).	Oppose. Though Labor is open to discussions that take into account total cost to growers to use the program, they do not want the farmworker wages to be too low.
Prohibit H-2A employers from fixing uniform wage rates across large areas -- states or regions.	?		
Reforms to the 50% rule as recommended by OIG.	Y	USDA agrees.	Labor agrees.
Modify existing 50% rule to only require hiring of local workers (that reside within commuting distance) but extend this obligation to the entire period of the contract.	N	Oppose. Blocks out of state U.S. crews from work.	Oppose. same reason.
Eliminate 50% rule except for workers referred through the registries <i>unless</i> there are other substantially similar job opportunities in the area.	Y	Would agree to apply the 50% rule only where equivalent jobs are not available in the area. This is currently the rule where the association in the employer. Also agrees that the 50% rule is good for U.S. workers.	Agrees.
H-2A workers should be covered under the State Unemployment Insurance System	Y	This could increase grower cost, but unlikely that they would oppose this.	Likely favor, though there is a question of whether this would only apply where U.S. farmworkers are covered under state law.
H-2A employers expressly authorized to pay hourly wage,	N	USDA might like this b/c it gives flexibility to	Labor will hate this, b/c they have asserted that

piece rate, task rate, or "other incentive payment method, including a group rate," irrespective of the prevailing payment method.		growers.	the task rate is too variable to be susceptible to a prevailing wage determination. There are also likely problems with the "group rate."
H-2A employers are in compliance with the wage requirements if "the average of the hourly earnings of the workers, taken as a group," equals the required hourly wage.	N	USDA may like this, but fairness concerns weigh against it.	Labor will not like this b/c it allow the growers to pay some workers less than the required hourly wage.
Prohibit payment by "task rate" or other variable rate method of payment.	Y	May not like b/c like grower choice.	Would likely favor. Have spoken out against the task rate.
Protect earnings level when employers convert from a piece rate to an hourly rate.	Y	USDA likely would not oppose, b/c it only holds the rate the same.	Protecting wage rates would seem a good thing to Labor.
For employers converting from hourly rate to piece rate, set piece rate to assure earnings at least 30% above AEWR.		This is another way to sweeten the wage that USDA will likely oppose.	This is another way to sweeten the wage that DOL will like, but it is -- in a way -- difficult to defend (unless you assume that growers are setting piece rates at levels well below the AEWR conversion).
H-2A workers apply for transportation reimbursement to the government (rather than the employer).		This is a shift of cost from the grower to the government. USDA will like this.	Labor does not like, for the same reason. However, as long as the cost to the grower remains the same for a U.S. worker (working under fair wages and good conditions) and an H2A worker, DOL will not fight if some overall costs are picked up by the government (as long as the cost is not coming out of their budget!).
H-2A workers may apply to the employer for transportation reimbursement, but employer not obligated to provide such reimbursement.	N	USDA may like this, b/c lowers cost for the grower. However, growers are used to paying transportation costs in this program. This cost is just part of the overall cost, and thus would go into the overall cost calculation (which, according to USDA, determines whether a grower will participate or hire illegals).	DOL will oppose. They want H2A workers to have transportation paid for. However, as noted, they may be amenable to a system that has the government assume some of this cost.

H-2A workers not eligible for transportation reimbursement if distance traveled is less than 100 miles.	?	This is part of the cost calculation. USDA may think that this is a small step in the right direction.	Labor would likely oppose as eroding the transportation guarantee. Not likely a big issue for either side.
Pilot program for transportation advances for U.S. farmworkers.	Y	USDA would likely be open to this.	DOL would also likely be open to this (a <i>small</i> pilot).
Require H-2A employers to provide travel advances to U.S. farmworkers.			
Charge fee = FICA/FUDA taxes to finance certain program activities (housing; admin. costs; transportation)	Y	USDA is in favor. The question is how high is the fee.	Labor is not opposed to a fee that would fund certain activities. The question is how high is the fee (more than FICA/FUDA?)
Impose user fees that reflect the cost of the H-2A program.		First, we are not sure how to calculate this cost (particularly, the cost of housing). Even if we could, USDA would be concerned that it would be too high (and thus cost prohibitive for growers to use). They are open, though, to a modest user fee.	As noted, Labor is also open to a user fee. However, it is not clear that they would want to push for a fee that was a total reimbursement (making it cost neutral for the government). That would surely make it too expensive for growers to use.
Allow H-2A workers to opt out of the employer-provided meal plans.		Unclear how they would react to this.	Labor would likely think this is o.k., b/c under the current system the cost of meals is deducted from the farmworker wages. However, there is some concern about making sure that workers don't opt out and then not have adequate food for the harvest.
Require first time H-2A employers to maintain wages and working conditions previously offered.		USDA would oppose this as restricting grower flexibility.	Labor would likely favor, but it could be hard to administer.
Housing			
Apply local or state (rather than federal) housing standards to housing provided by H-2A growers.		USDA would likely favor (local laws could give more flexibility), but it is just a race to the bottom. They could be convinced that federal	Labor would likely oppose. Would want federal standards to apply in this federal program. Also, would assume that federal

		standards should apply in a federal program.	standards are stricter.
H-2A employers permitted to charge workers up to fair market value for the cost of maintenance and utilities provided.		USDA likes as a way to reduce cost.	Labor hates as a way to erode wages.
H-2A employers can charge workers reasonable amounts (up to \$25 per week) for the cost of maintenance, utilities, repair and clean-up of housing provided.		Same	Same
H-2A employers can charge a security deposit (up to \$50) to protect against "gross negligence or willful destruction of property."		USDA likes as a way to share some costs with farmworkers and make them responsible for taking care of grower-provided housing.	Labor in general would not like, but likely some compromise could be struck on this one.
H-2A employers may require reimbursement (wage deduction) from responsible worker of reasonable cost of repairing damage to housing provided that is "not the result of normal wear and tear."	Y	According to DOL and USDA, this is current law.	
Reduced user fee to H-2A growers providing housing.		This is just another way to think about total cost to growers. If we have a user fee, we have to think about what we want it to pay for.	
H-2A employers may provide a "minimum housing allowance" in lieu of housing, unless (no earlier than 8 years after enactment) a state Governor certifies that there is not adequate farm worker housing available.		USDA would like as a cheaper way to meet the housing requirement.	Labor hates this. First, there is a shortage of affordable housing generally (which is particularly acute in rural areas). Second, it is unreasonable to expect a migrant worker from another country to be able to rent any housing on his own with a federal voucher.
H-2A employers may provide a "minimum housing allowance" in lieu of housing, but must also arrange for decent housing at the allowance level.		USDA would like this as affording choice to the grower on how to comply with the housing requirement.	This is better than above, but does not address the fact of great shortages of decent, affordable housing in rural areas. Under this system, what happens if housing is not available?
Require growers to provide free housing to all U.S. farm workers (including local workers).		USDA would not like this additional cost burden on the growers.	Labor would like as an ideal, but unrealistic to add this additional burden on growers (unless heavily subsidized by the federal government).

Require H-2A growers to make their housing available for U.S. workers who arrive early.			Can't see the objection to this one.	Labor likely is in favor.
Enforcement				
Extend to Wage & Hour the authority to debar violating employers who commit serious labor standards or H-2A program violations.	Y		USDA and DOL agreed to this during our earlier process. Will be part of upcoming rulemaking.	
Issue final H-2A regulations.	Y		DOL has agreed to this.	
Narrow DOL enforcement to only allow investigations only pursuant to a complaint.	N		USDA may like this, but not sure. It would be difficult for them to argue in favor of less enforcement, when there is so little already.	DOL would hate this. They need more not less enforcement money and tools.
Institute a 12-mo. statute of limitations on complaints			USDA likely would favor.	DOL may think this is o.k.
Provide a "reasonable cause" threshold for investigations.			USDA would likely favor.	DOL may want to reserve the right to do random inspections.
Limit penalties to certain types of violations.			Unclear what this recommendation means.	
Institute a three-year and permanent debarment period for repeat violations.			USDA would likely favor.	DOL would likely favor, unless this is substantially less than current law.
Require hiring of former H-2A workers (where allowed) to offset disincentives to complain about labor violations.			USDA would oppose. This too greatly limits grower flexibility in hiring.	Not sure if DOL would see this as an effective tool to offset disincentives to complain about labor violations.
Require disclosure of terms and conditions of employment to be given to workers in their native language in plain language.			Can't imagine opposition, unless it costs a lot.	Labor would likely favor.
More timely initiation and completion of DOL enforcement			We are all in favor of timeliness.	

actions.					
Immigration Management					
H2A worker ineligible for continued participation in the program if, during the prior 5 years, the worker violates the terms of admission to the U.S.				USDA would not likely have an opposition to this in theory.	DOL would not likely have an opposition to this in theory.
H2A workers admitted to the U.S. have 14 days after termination of employment contract to search for other legal work in the U.S.	Y			USDA would not likely have an objection.	DOL would not likely have an objection.
H2A workers admitted must be issued fraud-resistant identification/work authorization documents.	Y			USDA would not likely have an objection.	DOL would not likely have an objection.
An employer may file for extension of stay to employ an H2A worker already in the country and may legally employ such a worker from the date application is made.				USDA would likely support this idea because it provides growers with easy and quick access to H-2A workers.	DOL would likely oppose this idea because it would allow growers to get around the recruitment requirement.
AG study whether H2A workers timely depart the U.S. after period of authorized employment.	Y				
Legalization for H2A workers who complete at least 6 months employment in the U.S. under the H2A program for 4 consecutive years in compliance with program requirements.	N			USDA would not likely oppose this idea. However, it does not advance their goals because they believe that growers need a ready supply of foreign workers to meet short-term labor needs. Once legalized these foreign farmer workers would likely move into other sectors of the labor market.	DOL is opposed because it a) it gives the employers additional leverage over the workers by empowering them to hold the promise of a green card out to the foreign worker and b) it undercuts our immigration policy.
Require withholding of percentage of H2A workers wages, deposited in accounts reclaimable within limited time period in home country, as incentive to repatriate.	N			USDA supports incentives to repatriate and if they believed that if this would work they would support it.	DOL would likely oppose this because 1) there is no guarantee that the workers would actually receive these wages and 2) there is no evidence that this amount of money would be an incentive to repatriate.
User fee offsetting FICA/FUDA advantage used as					

repatriation incentive	N	Same position as above.	Same position as above.
Require entry-exit control system for all H2A workers.	Y	If this were possible, USDA and DOL would support it. However, at this time INS is unable to operate an effective exit and entry control system on the land borders.	
Other issues			
Expand scope of the H2A program to include agricultural -- meat/poultry -- processing employment.			
Secretary authorized to establish cap on number of H2A visas issued pursuant to application from "independent contractors, agricultural associations and such similar entities."	Y	USDA would likely support this as long as it was a high cap.	DOL supports this provision since 80% of all H-2A applications are from independent contractors or agricultural associations.
Comprehensive report by AG and Secretaries of Labor and Agriculture.	Y		
All H2A employers non-wage practices and benefits should be subject to prevailing practice standards.		USDA will want more flexibility for growers.	DOL would likely favor tying all practices and benefits to prevailing practice standards.
Assure that U.S. and H2A workers are truly allowed to choose their employer			
Cap the number of visas available under the H2A program.		See above.	See above.
Administrative Processes			
Consolidate DOL certification and INS petition approval into one process administered by DOL	Y		
Consolidate responsibility within DOL in Wage & Hour for post-application examination and enforcement of employer	Y		

compliance with H2A program requirements.				
Government -- not employer -- responsible for reimbursing transportation costs of eligible workers.	Y			
Require employers' H2A labor certification applications to be submitted 45 (rather than 60) days before the employer "date of need."	Y			
Reduce lead time for employer applications to 30 (rather than 60) days before "date of need."	Y			
Consistently meet 7 day deadline -- after initial receipt of employer's labor certification application -- to give written notification to the employer of deficiencies precluding adjudication of the application.	Y			
Consistently meet existing 20 day deadline -- prior to employer's date of need -- to issue approved certifications	Y			
After consolidation of certification and petition adjudication process in DOL, change the law to set deadline for DOL approval of employers' application to 7 days before date of need.	Y			
Reduce the deadline for employer-provided housing to be available for inspection to 15 (rather than 30) days before the date of need.	Y			
Change the current labor certification to one based on employers' attestations to comply with program requirements.	?	Unsure how this changes employer obligations.		

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME:12-SEP-1998 11:46:52.00

SUBJECT: Re: weekly

TO: Christopher C. Jennings (CN=Christopher C. Jennings/OU=OPD/O=EOP @ EOP [OPD])

READ:UNKNOWN

TEXT:

hmmm... bruce did last week's, so he must have taken it out. i've never seen it.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME:16-SEP-1998 11:06:54.00

SUBJECT: c.v.

TO: elhauge (elhauge @ law.harvard.edu @ inet [UNKNOWN])

READ:UNKNOWN

TEXT:

Here's my c.v. Thanks again.

===== ATTACHMENT 1 =====

ATT CREATION TIME/DATE: 0 00:00:00.00

TEXT:

Unable to convert ARMS_EXT:[ATTACH.D13]MAIL44428585R.226 to ASCII,
The following is a HEX DUMP:

FF575043AE040000010A020100000002050000000B317000000020000061FDC3F0743B381587F85E
8AE8B83C0BF09B750382EF3A4A34EAF514B201DBE0C6EB9C9B0F9A996401CEB74DB43E3C12817B
5EEB16879BA5E081832B714B91B8BEDE3C981D041488A5C9177CF251FD14AE0144918C257D7C01
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ELENA KAGAN

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EMPLOYMENT:

**Deputy Assistant to the President for Domestic Policy
and Deputy Director of the Domestic Policy Council**
January 1997-current

Associate Counsel to the President
1995-1996

Professor, University of Chicago Law School
1994-97
(Assistant Professor, 1991-94; on leave, 1995-97)
Courses taught: Constitutional Law; Labor Law; Civil Procedure
Seminars taught: Rights of Political Participation; Supreme Court
Litigation
Recipient, Graduating Class of 1993 Award for Teaching Excellence

Special Counsel, Senate Judiciary Committee
June-August 1993
Principal aide for confirmation hearings of Ruth Bader Ginsburg

Litigation Associate, Williams & Connolly
1989-91

Staff Member, Research Unit, Dukakis for President Campaign
July-November 1988

Judicial Clerk, Hon. Thurgood Marshall
Supreme Court of the United States, 1987-88

Judicial Clerk, Hon. Abner J. Mikva
United States Court of Appeals for the D.C. Circuit, 1986-87

EDUCATION:

Harvard Law School
J.D., *magna cum laude*, 1986
Supervising Editor, *Harvard Law Review*

Worcester College, Oxford University
M. Phil in Politics, 1983

Princeton University
A.B. in History, *summa cum laude*, 1981
Phi Beta Kappa
Recipient, Daniel M. Sachs Graduating Scholarship for two years

of study at Oxford University
Editorial Chairman, *The Daily Princetonian*

PUBLICATIONS:

Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Analysis, 63 *University of Chicago Law Review* 413 (1996).

When A Speech Code Is A Speech Code, 1996 *University of California at Davis Law Review*.

Confirmation Messes, Old and New (Book Review), 62 *University of Chicago Law Review* 919 (1995).

The Changing Faces of First Amendment Neutrality, 1993 *Supreme Court Review* 29.

Pornography and Hate Speech After *R.A.V. v. St. Paul*, 59 *University of Chicago Law Review* 873 (1993).

A Libel Story (Book Review), 17 *Law & Social Inquiry* 197 (1993).

For Justice Marshall, 71 *Texas Law Review* 1125 (1993).

PROFESSIONAL ACTIVITIES:

Member, Governing Committee, ABA Forum on Communications Law, 1996-current

Public Member, Administrative Conference of the United States, 1994-95

Member, Board of Governors, Chicago Council of Lawyers, 1993-95

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME:16-SEP-1998 14:36:58.00

SUBJECT: Re: Southwest Border

TO: Jose Cerda III (CN=Jose Cerda III/OU=OPD/O=EOP @ EOP [OPD])

READ:UNKNOWN

TEXT:

why did chuck talk to McC about it? I thought we all agreed that the right approach was from nsc.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME:17-SEP-1998 19:13:27.00

SUBJECT: T/P Approps. Letter

TO: Julie A. Fernandes (CN=Julie A. Fernandes/OU=OPD/O=EOP @ EOP [OPD])

READ:UNKNOWN

TEXT:

please work with peter on this.

----- Forwarded by Elena Kagan/OPD/EOP on 09/17/98 07:13

PM -----

Kate P. Donovan

09/17/98 07:04:10 PM

Record Type: Record

To: Maria Echaveste/WHO/EOP, Peter G. Jacoby/WHO/EOP, Elena Kagan/OPD/EOP

cc: Kevin S. Moran/WHO/EOP, Martha Foley/WHO/EOP, Charles E.

Kieffer/OMB/EOP, Leslie Bernstein/WHO/EOP

Subject: T/P Approps. Letter

Maria - I was told today that you have asked Peter & Elena to add some "Haitian" language to the Treasury/Postal Appropriations conferees letter that was in clearance today. Chuck Kieffer has asked that we get this language tonight if possible so that we can finalize and release the conferees letter tomorrow morning. Thank you.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME:17-SEP-1998 18:29:52.00

SUBJECT: Re: new draft of race speech; suggestions for cuts greatly appreciated

TO: June Shih (CN=June Shih/OU=WHO/O=EOP @ EOP [WHO])

READ:UNKNOWN

TO: Ann F. Lewis (CN=Ann F. Lewis/OU=WHO/O=EOP @ EOP [WHO])

READ:UNKNOWN

Bruce N. Reed (CN=Bruce N. Reed/OU=OPD/O=EOP [OPD])

READ:UNKNOWN

TEXT:

In a meeting yesterday, the President specifically brought up Chicago and said that the best thing that could happen to k-12 education was for every school district to do what chicago had done. I suspect that the President will say something like this regardless whether we put it into the speech (so taking it out would be a false savings). But even if that's not right, I'd argue for keeping it in because the President really does believe that this is the approach most likely to lead to racial equality.

RECORD TYPE: PRESIDENTIAL (NOTES READ RECEIPT)

CREATOR: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME:18-SEP-1998 21:27:36.00

SUBJECT: RECEIVED: DRAFT DOD APPROPRIATIONS CONFEREES LETTER

TO: Kate P. Donovan (CN=Kate P. Donovan/OU=OMB/O=EOP [OMB])

READ:UNKNOWN

TEXT:

Unable to convert ARMS_EXT:[MESSAGE.D66]MAIL48946716H.226

The following is a HEX dump of the file:

[illegible]

September 16, 1998

MEMORANDUM FOR THE CHIEF OF STAFF

FROM: Bruce Reed
Elena Kagan

SUBJECT: DPC October Event Ideas

Health Care

Long-Term Care: If Democrats decide to introduce an alternative tax bill, we could do an event (either before or concurrent with the Democratic unveiling) that highlights the President's long-term care initiative. The President's proposal would provide for a \$500-\$1,000 tax credit to people with long-term care needs or their caregivers. It would cost about \$5 billion over 5 years and help about 2.2 million people. At the same time, the President could call for the Federal Employees Health Benefit plan to offer long-term care insurance to federal employees. OPM estimates that 300,000 people would buy these policies.

Work Incentives and Health Care for People with Disabilities: Within a week, we will know whether the Senate will vote on the Jeffords-Kennedy Work Incentives Improvement Act -- the disability community's top health priority -- this year. If the bill does come to a vote, we could do a strong event with the disability and AIDS communities emphasizing our involvement in developing the bill and calling on the Senate to pass it. We also could announce the approval of four states for the new "date certain" grant program. This initiative (long sought by the disability community) gives states the ability to use Medicaid funds to offer a time-limited opportunity for institutionalized disabled persons to return to their communities to receive the long-term care services they need. The disabilities community views the program as an important step in moving Medicaid away from its historic bias toward institutionalizing the chronically ill.

Children's Health: October is the first anniversary of the effective date of the Children's Health Insurance Program (CHIP), and October 5 is Child Health Day. We could release the first annual report on states' progress in implementing CHIP, which is expected to coincide with a sufficient number of state approvals to cover 2.5 million kids. At this event, we would launch phase one of our children's health outreach campaign with NGA, which includes new radio ads in 10 states (set to begin October 1) targeted to parents of uninsured children eligible for CHIP or Medicaid. We also are trying to get a commitment from Americorps to participate in signing families up for Medicaid and CHIP on the local level.

Patients' Bill of Rights: We would like to do at least one more patients' bill of rights event, preferably on the road, prior to the election. We might want to do a kind of wrap-up event, now

that we have just about finished applying the bill of rights to federal health plans, toting up everything we have done by executive action (i.e., how many people covered) and comparing it to what Congress has accomplished (i.e., nothing). The AFL-CIO (per Jerry Shea) strongly favors this event.

Cancer Event(s): In addition to the September 26 Cancer March (and the President's possible involvement through a radio address), October is National Breast Cancer Awareness month. It is also the fifth anniversary of the President's launching of the National Action Plan on Breast Cancer. We have tentatively scheduled October 21 for an event with the First Lady to (1) release a new report on the progress the Administration has made in the fight against breast cancer, and (2) highlight a new information outreach and screening campaign focused on underserved minorities. Because of the President's strong cancer record, as well as his desire to underscore our commitment to ending health disparities among races, the President might want to participate in this event.

Elder Abuse: See Crime section of this memo.

Education

September Grants: The Education Department will announce prior to September 30: (1) technology grants (\$30 million to 17 states); (2) charter school grants (\$60 million to 20 states); (3) safe and drug free school grants (\$5 million for model school partnerships and universities); and (4) school-to-work grants (\$40 million to urban and rural communities, which must be given on September 30). We can try to combine as many of these grants as possible into a single event, perhaps in Chicago.

Potential Bill Signings: (1) The Higher Education Act is virtually certain to pass this session, though the timing is uncertain. It is likely to contain provisions to reduce student loan interest rates, as well as programs based on our High Hopes and Teacher Recruitment and Preparation proposals. (2) Prospects for passing the charter schools legislation are decent, though hardly guaranteed. (3) Ditto the prospects for passing an early literacy bill.

Safe Schools Conference: On October 15, the President will host a White House Conference on School Safety and take the following actions: (1) release the first annual report on school safety, including school crime data, information on model safe schools, and recommended action steps for parents and teachers; (2) unveil a proposal to reform the Safe and Drug Free Schools program and call for additional funds in the FY 2000 budget; (3) announce a new FEMA-like program of assistance for communities that have experienced school-related violence; (4) launch new comprehensive school safety grants that will bring together disparate streams of funding from the Departments of Justice, Education, and Health and Human Services; and (5) start a partnership with MTV on school safety, which includes a year of PSAs.

Crime

September COPS Grants: The President could announce in late September \$370 million in grants to hire or redeploy 11,500 more police officers. This announcement would include \$100 million for Los Angeles to hire 700 new police officers, \$70 million for the rest of California to hire 800 new officers, and \$200 million for COPS MORE grants to allow police departments in communities across the nation to redeploy more than 10,000 officers.

Elder Abuse and Fraud: The President could take several actions to combat elder abuse and fraud, including: (1) releasing the preliminary findings of an HHS study on elder abuse; (2) creating a new national center on elder abuse; (3) calling on Congress to reauthorize the Older Americans' Act, which includes services to help older Americans at risk for abuse; (4) launching a new partnership between the Justice Department and AARP to create Elder Fraud Prevention Teams (EFPTs) in four cities (Miami, Phoenix, San Diego, and Seattle); (5) releasing roughly \$3 million in Justice Department grants to combat fraud against the elderly (by September 30); and (6) posting new information on telemarketing fraud on the Department of Justice Web site.

TOP COPS Legislation: The President could sign legislation to expand educational benefits for the children of slain local law enforcement officers at the NAPO TOP COPS event on October 9, assuming the legislation is passed in time. The President endorsed this proposal at last year's TOP COPS event. The bill has passed the Senate and is waiting for a floor vote in the House.

1997 FBI Crime Statistics: Coinciding with the October 18 release of the final 1997 FBI Uniform Report -- which will continue to show large decreases in crime -- the President could give a major policy speech on how this Administration's efforts have helped to fuel the longest sustained drop in violent crime in nearly 40 years. The speech would commemorate the fourth anniversary of the landmark 1994 Crime Act; highlight the crime policies, including signature initiatives such as COPS, that have helped to change the nation's approach to crime; and begin to make the case for new crime proposals that will be included in the State of the Union and FY 2000 budget.

Youth Crime Gun Interdiction Initiative: Anytime after October 23, the President could: (1) release the second annual report on the Youth Crime Gun Interdiction Initiative (YCGII), which will provide new ATF data on guns used in crimes in 27 cities; (2) announce the availability of new funds to hire new ATF agents to investigate gun trafficking in these 27 cities; and (3) propose a dramatic expansion of this initiative in the FY 2000 budget to all major cities (i.e., the 65-70 cities with populations of 250,000 or more), which would cost about \$30 million (pending OMB's approval). Additionally, because we expect the YCGII report to make a strong case for cracking down on "straw purchasers" and gun shows, we are considering whether the President should announce his support for legislation requiring background checks for all secondary market gun purchases.

Children and Families

Head Start Reauthorization Bill: The President should have the opportunity to sign a Head Start Reauthorization bill this year. A bill signing could highlight the how the Administration has (1) significantly increased Head Start participation; (2) dramatically improved program quality; and (3) created Early Head Start for infants and toddlers.

Quality Child Care for Federal Employees Act: The President may get an opportunity to sign the Quality Child Care for Federal Employees Act, which makes important improvements to federally-sponsored child care by building on an executive memorandum that the President issued in March 1998. (Congress, however, might add this measure to an appropriations bill.) We could announce new CCDBG data (see just below) at this signing.

New Child Care Data. The President could announce new data of the number of children served with child care assistance through the Child Care and Development Block Grant (CCDBG). This data will point to the need for increased investment in the block grant; we expect the data to indicate that we are serving approximately 1.8 million children of the 10 million eligible for assistance. This is the first data to examine the CCDBG created by welfare reform in 1996 (when four child care assistance programs were consolidated).

CEO Roundtable Discussion on Work/Family Issues: The President could host a meeting of CEOs to discuss “family-friendly” workplace practices that meet the needs of the nation’s changing workforce. The President could release a new CEA report, if it is ready, on Families and the Changing Labor Market. Additionally, the President could signal support for the design of a paid parental leave program (policy development process required). This meeting would build on the work of the Treasury Child Care Working Group, run by Secretary Rubin.

Welfare

National Child Support Case Registry: HHS is almost ready to put in place a new national database of child support cases, called a Federal Case Registry. This database will make it easier to locate deadbeat parents, especially if they have moved to a different state; HHS will check the Registry daily against an existing database of new employees; when it finds a match, it will report the information to the state, which then will arrange to garnish the wages of the delinquent parent. The registry was proposed by the President in 1994 and enacted as part of the 1996 welfare reform law. States will begin to submit their case data to HHS on October 1; HHS expects to have 30 states in its system by the end of October and 40 states by the end of the year. We could unveil the new registry anytime in October.

Work Participation Rates and Other Statistics: In late October, the President could visit a welfare-to-work program and announce (1) new state work participation rates, showing that almost all states are meeting the welfare law’s single-parent requirements, but some are failing to meet the law’s separate two-parent requirement; (2) new caseload data

showing continuing declines; and (3) new data on the number of people who were on welfare in 1997 and working in March 1998.

Tobacco

OSHA Rule: The President could sign an Executive Order directing OSHA to issue within one year a standard establishing a smoke-free workplace for all private sector employees. OSHA has been working since 1991 on a standard regulating all indoor air pollutants (including but not limited to environmental tobacco smoke), but is years away from completing the standard, principally because there is scanty scientific evidence to justify the regulation of certain non-ETS pollutants. If the President ordered a separate standard only on ETS, OSHA believes it could complete the work within a year. The resulting standard would be similar to the August 1997 Executive Order banning smoking in federal buildings.

Counteradvertising: In an event focusing on counteradvertising, the President could direct HHS to: (1) designate the CDC's Media Campaign Resource Center as a National Clearinghouse on Tobacco Counteradvertising; (2) collect and disseminate a package of the top-10 advertisements for preventing youth smoking, and make these available to states and organizations for television placement free of charge; and (3) make effective anti-tobacco curriculum available to every school. Supermodel Christy Turlington and the musical group "Boyz II Men" have made PSAs that would be among the top-10 package, and we could invite them to participate in the event.

Department of Defense Anti-Tobacco Plan: The President could help unveil the DOD's new comprehensive anti-tobacco plan. This plan includes: health plan coverage of over-the-counter nicotine replacement therapies; an extensive counteradvertising campaign; and the incorporation of anti-tobacco messages into military education and training programs. The total cost is about \$60 million. The Secretary of Defense and/or Chairman of the Joint Chiefs of Staff could join the President.

Food Safety

Salmonella and Research: The President could announce a preliminary USDA study showing that salmonella risks have declined by almost 50 percent in chicken and almost 40 percent in swine, largely because of the HACCP program. At the same time, he could participate in a kind of "show and tell" event demonstrating the importance of research to food safety, showing for example how federal research has led to technologies dramatically reducing salmonella in chicken and e-coli in cows.

Service

Americorps 100,000th Member Event: CNS is planning national service events in Washington and around the country on October 23 to celebrate the swearing-in of the 100,000th Americorps member. At this event (or at some other time), the President also could announce: (1) new grants

to support 500-1000 Americorps Promise Fellowships to support the goals set at the Presidents' Summit; (2) the recipients of the President's Service Awards, the nation's highest volunteer service award; and (3) the recipients of the President's Student Service Awards.

Community Empowerment

Individual Development Accounts: The President may have an opportunity to sign a bill to provide funds for IDAs, which the President has supported since 1992. At the bill signing, the President could announce that he is sending a letter to the bank regulators asking that IDA accounts count towards a financial institution's CRA requirements.

RECORD TYPE: PRESIDENTIAL (NOTES READ RECEIPT)

CREATOR: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME:18-SEP-1998 21:27:34.00

SUBJECT: RECEIVED: URGENT: FOREIGN OPS SAP

TO: Kate P. Donovan (CN=Kate P. Donovan/OU=OMB/O=EOP [OMB])
READ:UNKNOWN

TEXT:
RETURN RECEIPT

Your Document:
URGENT: FOREIGN OPS SAP
was successfully received by:
CN=Elena Kagan/OU=OPD/O=EOP
at:
09/17/98 12:14:20 PM

RECORD TYPE: PRESIDENTIAL (NOTES READ RECEIPT)

CREATOR: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME:18-SEP-1998 21:27:33.00

SUBJECT: RECEIVED: DRAFT TREASURY/POSTAL APPROPS CONFEREES LTR

TO: Kate P. Donovan (CN=Kate P. Donovan/OU=OMB/O=EOP [OMB])

READ:UNKNOWN

TEXT:

RETURN RECEIPT

Your Document:

DRAFT TREASURY/POSTAL APPROPS CONFEREES LTR

was successfully received by:

CN=Elena Kagan/OU=OPD/O=EOP

at:

09/17/98 12:14:53 PM

RECORD TYPE: PRESIDENTIAL (NOTES READ RECEIPT)

CREATOR: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME:18-SEP-1998 21:27:32.00

SUBJECT: RECEIVED: NEED CLEARANCE: SAP: HR 3736 - WORKFORCE IMPROVEMENT AND PROTECTION ACT

TO: Kate P. Donovan (CN=Kate P. Donovan/OU=OMB/O=EOP [OMB])

READ:UNKNOWN

TEXT:

RETURN RECEIPT

Your Document:

NEED CLEARANCE: SAP: HR 3736 - WORKFORCE IMPROVEMENT AND PROTECTION ACT

was successfully received by:

CN=Elena Kagan/OU=OPD/O=EOP

at:

09/17/98 02:37:09 PM

RECORD TYPE: PRESIDENTIAL (NOTES READ RECEIPT)

CREATOR: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME:18-SEP-1998 21:27:35.00

SUBJECT: RECEIVED: DRAFT TRANSPORTATION APPROPRIATIONS LETTER

TO: Kate P. Donovan (CN=Kate P. Donovan/OU=OMB/O=EOP [OMB])

READ:UNKNOWN

TEXT:

RETURN RECEIPT

Your Document:

DRAFT TRANSPORTATION APPROPRIATIONS LETTER

was successfully received by:

CN=Elena Kagan/OU=OPD/O=EOP

at:

09/14/98 08:45:00 PM

RECORD TYPE: PRESIDENTIAL (NOTES READ RECEIPT)

CREATOR: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME:18-SEP-1998 21:27:37.00

SUBJECT: RECEIVED: URGENT: HOUSE FOREIGN OPERATIONS LETTER

TO: Kate P. Donovan (CN=Kate P. Donovan/OU=OMB/O=EOP [OMB])

READ:UNKNOWN

TEXT:

RETURN RECEIPT

Your Document:

URGENT: HOUSE FOREIGN OPERATIONS LETTER

was successfully received by:

CN=Elena Kagan/OU=OPD/O=EOP

at:

09/09/98 07:27:58 PM

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME:18-SEP-1998 09:12:14.00

SUBJECT: Re: new draft of race speech; suggestions for cuts greatly appreciated

TO: Bruce N. Reed (CN=Bruce N. Reed/OU=OPD/O=EOP [OPD])

READ:UNKNOWN

TEXT:

----- Forwarded by Elena Kagan/OPD/EOP on 09/18/98 09:12
AM -----

Ann F. Lewis

09/18/98 07:38:45 AM

Record Type: Record

To: Elena Kagan/OPD/EOP

cc:

Subject: Re: new draft of race speech; suggestions for cuts
greatly appreciated

You're right -- maybe I was trying to be too cute about shortening the
draft. But since he will add anyway , I was aiming for a shorter starting
place....

RECORD TYPE: PRESIDENTIAL (NOTES READ RECEIPT)

CREATOR: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME:18-SEP-1998 21:27:31.00

SUBJECT: RECEIVED: T/P Approps. Letter

TO: Kate P. Donovan (CN=Kate P. Donovan/OU=OMB/O=EOP [OMB])

READ:UNKNOWN

TEXT:

RETURN RECEIPT

Your Document:

T/P Approps. Letter

was successfully received by:

CN=Elena Kagan/OU=OPD/O=EOP

at:

09/17/98 07:12:39 PM

[illegible]

September 20, 1998

MEMORANDUM FOR THE CHIEF OF STAFF

FROM: Bruce Reed
Elena Kagan

SUBJECT: Tobacco Update

This memo (1) advises you of recent conversations we have had with an attorney for the industry, which confirm that the industry has no interest in expanding its expected settlement with the states, in the way suggested by Dick Scruggs, to include the federal government; (2) informs you of a recent NGA/NAAG proposal that Congress pass legislation eliminating the federal government's claim for a portion of state tobacco recoveries, and outlines a compromise proposal that Governor Chiles may suggest to you on Tuesday; and (3) outlines a new idea of Bruce Lindsey's to try to use the state settlement discussions to gain clear FDA jurisdiction over tobacco products.

1. Meyer Koplow, the outside counsel for Phillip Morris, told us last week that the industry has no interest in bringing the federal government into its settlement discussions with the states. (Our initial conversations with Koplow took place the week before last, but Koplow took some time to speak with his client and get back to us.) According to Koplow, the industry does not think it makes sense to upset the state negotiations, given how close they are to success, in order to pursue a broader settlement whose prospects of completion are highly uncertain. (Koplow, of course, speaks only for Phillip Morris, but if Phillip Morris is not interested in talking with us, we can bet that no one else is either.)

In explaining this conclusion, Koplow first noted the legal complexities involved in crafting a comprehensive settlement -- in particular, the difficulty of insulating the liability protections and the FDA provisions from legal challenge. Although he thought there was some chance of resolving these issues to all parties' satisfaction, he said (correctly) that we would have to do much hard work before knowing whether such a resolution was possible. Koplow also noted the practical difficulties involved in the Scruggs scheme; for example, he believes that the states would not agree to any arrangement that would subtract punitive damages from their share of the money. Finally, Koplow stressed the "psychological" difficulties of attempting to reach an agreement. The industry, according to Koplow, simply does not trust us; it fears that we will bow to political pressure and increase our demands during negotiations.

Koplow left open the possibility that the industry would want to deal with us separately at some future time, after it had completed the state settlement. He noted that Phillip Morris wants to resolve all government claims, including potential claims by the federal government. He

implied that the kind of deal Phillip Morris contemplates would not necessitate legislation and would include (1) money, (2) FDA jurisdiction, and (3) certain marketing restrictions excluded from the state settlement (in part so the industry has something to offer the federal government). He did not specifically raise liability protections in this context.

2. The National Association of Attorneys General (NAAG) wrote a letter to Congressional leaders last week urging them to pass legislation before Congress adjourns to “clarify that the Health Care Finance Administration should not assert any claims against state tobacco recoveries” (letter attached). We can expect the NGA to support this demand strongly; indeed, Republican Governors probably have talked already with Senator Lott and Speaker Gingrich about moving this legislation. A set of talking points prepared for Democratic Governors, for use in a recent phone call with the Administration, urges us to support the legislation, as does a letter that Senator Graham just sent you (talking points and letter attached).

Governor Chiles is meeting with you on Tuesday, primarily to discuss this issue. (As you know, Florida has a very special interest in the issue because it is one of four states to have completed a settlement with the industry.) Chiles may urge you to support a bill that simply eliminates the federal government’s claim to any tobacco recovery, as described above. His staff, however, has suggested that Chiles may come in with a compromise option, predicated on the agreement we reached with the NGA in the context of the McCain legislation. Under this approach, the federal government would renounce its claim to a state recovery when but only when the state agreed to use half its money on a menu of seven items: child care; child welfare; the maternal and child health block grant; the substance abuse block grant; the safe and drug free schools program; Eisenhower education grants; and the state match for the children’s health insurance program (subject to a six percent ceiling). This approach would give us exactly what we would have gotten from the “state side” of the McCain legislation, and we should seriously consider it -- especially given the alternative legislation that the NGA and NAAG are proposing.

We should note that any proposal restricting the federal government’s ability to bring claims against the states will involve serious budget issues. The Congressional Budget Office currently projects that the federal government will recoup \$1.2 billion over five years from state tobacco settlements; we can expect the Office to score even Chiles’s compromise approach at approximately that amount. The Governors supposedly have agreed on a plan to reimburse the federal government for this cost, under which they would divide the cost amongst themselves based on their share of the total settlement funds. OMB is currently evaluating this proposal.

3. Bruce Lindsey has proposed a more ambitious plan for using our recoupment claims as leverage to get something out of a state settlement. Under the Lindsey plan, we would drop our recoupment claims if a state agreed to (1) take 45 percent of the money unrestricted; (2) use 45 percent of the money for the seven items on our menu; and (3) give over 10 percent of the money to a “tort fund” which would pay legal judgments against the industry. If the judgments failed to exhaust the tort fund, the remaining money in the fund would return to the unrestricted state pot. Conversely, if the judgments exceeded the tort fund, the remaining liability would come out of

the restricted state pot -- and if that too were exhausted, would revert to the industry. In exchange for this potentially valuable benefit (which could rebate to states up to 55 percent of the cost of the settlement), the industry would agree to FDA jurisdiction -- if possible, through the settlement itself; if not, by dropping its opposition to legislation.

The great virtue of this scheme is that it could make the state settlement partly our victory: if everything works correctly, we would achieve the important goal of full FDA jurisdiction. The scheme, however, raises at least three questions. First, we may not be able to convert this deal into an effective guarantee of FDA jurisdiction. The legal difficulty of getting regulatory jurisdiction through a settlement is heightened in this scheme because we probably could not be a party to the agreement; moreover, the industry's assurance that it would not fight a legislative solution (even if it is believed) hardly guarantees the result we want in a Congress replete with FDA-haters. Second, even if we could surmount this problem, the states may well refuse to consider this plan, given that it puts more than half of their money at risk of going back to the industry for legal judgments. Third, the left in our own party may react with outrage to this agreement, arguing that we effectively have "bought" FDA jurisdiction by granting the industry relief from liability. We would have to explore these questions more thoroughly before pursuing this option.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME:22-SEP-1998 18:46:48.00

SUBJECT: Re: Chiles

TO: Fred DuVal (CN=Fred DuVal/OU=WHO/O=EOP @ EOP [WHO])

READ:UNKNOWN

TEXT:

very odd -- is that what he's always like.

i hope you weren't insulted -- it's ok not to have as much clout as the
deputy chief of staff.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME:22-SEP-1998 08:20:24.00

SUBJECT: Children's Health Briefing

TO: Jennifer L. Klein (CN=Jennifer L. Klein/OU=OPD/O=EOP @ EOP [OPD])
READ:UNKNOWN

TEXT:

jen: could you figure out what they're doing?

----- Forwarded by Elena Kagan/OPD/EOP on 09/22/98 08:19
AM -----

Bradley M. Campbell
09/21/98 12:25:36 PM
Record Type: Record

To: See the distribution list at the bottom of this message
cc: See the distribution list at the bottom of this message
Subject: Children's Health Briefing

On Thursday, September 24, from 11:00 am to 1 pm in Room 472, EPA and HHS will be presenting a joint briefing on forthcoming initiatives and roll-out opportunities under President Clinton's executive order on environmental health risks to children (4/97). I believe this briefing will be of interest to all White House policy offices, and pertinent to the FY2000 budget process. I would be grateful if you could attend.

Message Sent

To: _____
T J. Glauthier/OMB/EOP
Sally Katzen/OPD/EOP
Paul J. Weinstein Jr./OPD/EOP
Elena Kagan/OPD/EOP
Jennifer L. Klein/OPD/EOP
Barbara Chow/OMB/EOP
GARY GUZY <GUZY.GARY @ EPAMAIL.EPA.GOV>
Barbara Chow/OMB/EOP
Christopher C. Jennings/OPD/EOP
Kathleen A. McGinty/CEQ/EOP

Message Copied

To: _____
Neera Tanden/WHO/EOP
Michele J. Altemus/CEQ/EOP
Claudia M. Abendroth/OMB/EOP
Pamela S. Barr/OMB/EOP
Nancy Marlow/CEQ/EOP
Wesley P. Warren/CEQ/EOP
Lisa Guide/CEQ/EOP
Shannon Mason/OPD/EOP
Ronald M. Cogswell/OMB/EOP
Robert S. Fairweather/OMB/EOP
Beth A. Viola/CEQ/EOP
Elliot J. Diringer/CEQ/EOP

Michael V. Terrell/CEQ/EOP

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME:23-SEP-1998 10:54:45.00

SUBJECT: single sex schools update

TO: Bruce N. Reed (CN=Bruce N. Reed/OU=OPD/O=EOP [OPD])

READ:UNKNOWN

TEXT:

----- Forwarded by Elena Kagan/OPD/EOP on 09/23/98 10:54 AM -----

Michael Cohen

09/23/98 10:09:59 AM

Record Type: Record

To: Elena Kagan/OPD/EOP

cc: Laura Emmett/WHO/EOP

Subject: single sex schools update

Here's what Scott Fleming learned since our meeting yesterday:

1. Kennedy's goal is to draft an amendment that he can use to "get back" the women Dem's who voted with Hutchinson the last time, and then go with them to Hutchinson to work out a deal (Scott and I think this is a very unlikely scenario). While Kennedy's education staff (Donica Petrovich) says that Kennedy feels strongly about this, it appears that he is mainly being moved by the women's groups. Donica admitted that she is having a hard time getting the women Dem's very interested in this issue.

2. Patty Murray's staff (Murray voted and worked against Hutchinson the last time) also reports that there is little interest among women Dem's on this amendment. And while he confirmed Murray's opposition, she doesn't feel that strongly about this either.

3. In short, as we suspected yesterday, the women's groups are the big issue here. In all likelihood, if they weren't pushing this one, there would not be much opposition among Dems. So, a meeting with them still seems like a necessary step. Any word from Podesta on this issue?

4. In addition, I continue to think it might be helpful if Kennedy, the female Dems and Dems on the Ed and Labor committee had good information on the NYC school. This won't directly help with the women's groups, but may give the Dems some addition comfort if they decide to part ways with them on this issue.

Withdrawal/Redaction Marker

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
004, email	Elena Kagan to Ron Klain re: breakfast (1 page)	09/24/1998	Personal Misfile

COLLECTION:

Clinton Presidential Records
Automated Records Management System [Email]
OPD ([From Elena Kagan])
OA/Box Number: 250000

FOLDER TITLE:

[8/22/1998 - 9/27/1998]

2009-1006-F
ry940

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

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RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME:24-SEP-1998 15:25:31.00

SUBJECT: Paper

TO: Sarah A. Bianchi (CN=Sarah A. Bianchi/OU=OPD/O=EOP @ EOP [OPD])

READ:UNKNOWN

TEXT:

sarah -- when can you and chris get this to me?

----- Forwarded by Elena Kagan/OPD/EOP on 09/24/98 03:25
PM -----

Christa Robinson

09/24/98 01:49:20 PM

Record Type: Record

To: Sarah A. Bianchi/OPD/EOP

cc: Laura Emmett/WHO/EOP, Elena Kagan/OPD/EOP

Subject: Paper

The paper for the Cancer Radio Address needs to be emailed TONIGHT to the press office. It doesn't matter what time, but they absolutely need it before 7am tomorrow morning -- their plane leaves at 8am. If this is impossible, let me know asap so I can try to negotiate.

[illegible]

Event on Telemarketing and Elder Abuse. Next week you are scheduled to participate in an event on elder abuse. At this event, we are announcing a new study which concludes that elder abuse is a major problem, as more than 500,000 Americans aged 60 and over were the victims of abuse or neglect in their own homes during 1996. In addition, fraudulent telemarketers continue to target frail and vulnerable older Americans as their primary victims. You are taking a number of actions to crack down on combat elder abuse and fraud, including: (1) announcing the creation of a new national center on elder abuse that will train officials to better detect and respond to abuse and neglect; (2) calling on Congress to reauthorize the Older Americans' Act, that helps states prevent elder abuse, counsel seniors on their rights, and coordinate legal services for those who can not afford representation; (3) launching a new partnership between the Justice Department and AARP to create Elder Fraud Prevention Teams; and (4) releasing \$3 million **to combat telemarketing scams and other forms of fraud against the elderly.**

[illegible]

September 26, 1998

MEMORANDUM FOR THE PRESIDENT

FROM: Bruce Reed
Elena Kagan

SUBJECT: DPC Weekly Report

Tobacco -- Chiles Meeting: In a meeting with Erskine and us on Tuesday, Governor Chiles encouraged the Administration to support compromise legislation that would eliminate the federal government's Medicaid claim to state tobacco recoveries, in exchange for the states agreeing to use half their money on the menu of seven items that we negotiated with the NGA as part of the McCain legislation (child care, child welfare, the maternal and child health block grant, the substance abuse block grant, the safe and drug free schools program, Eisenhower education grants, and the state match for the children's health insurance program). Erskine agreed that this represents a preferable alternative to the pending NGA proposal which would simply eliminate our claims outright. While he indicated that we would support this compromise in the end, he emphasized that we cannot be out front on this because it would appear that we were undercutting the Kerry-Bond provision in the McCain bill which required the states to spend half of their restricted funds on child care. Both Jack Lew and Secretary Shalala approve of this strategy. While we have not yet seen the legislative language for Chiles' proposal, DPC and OMB staff will review it closely to ensure it is acceptable to us and that it adequately reimburses the federal government for the \$1.2 billion over 5 years that the federal government would otherwise recoup from state settlements.

Health Care -- Event on Telemarketing and Elder Abuse: Next week you are scheduled to participate in an event on elder abuse. At this event, we are announcing a new study which concludes that elder abuse is a major problem. The report will state that **more than 500,000 Americans aged 60 and over were the victims of abuse or neglect in their own homes during 1996.** In addition, fraudulent telemarketers continue to target frail and vulnerable older Americans as their primary victims. **You are taking a number of actions to crack down on combat elder abuse and fraud, including: (1) announcing the creation of a new national center on elder abuse that will train officials to better detect and respond to abuse and neglect; (2) calling on Congress to reauthorize the Older Americans' Act, that helps states prevent elder abuse, counsel seniors on their rights, and coordinate legal services for those who can not afford representation; (3) launching a new partnership between the Justice Department and AARP to create Elder Fraud Prevention Teams; and (4) releasing \$3 million to combat telemarketing scams and other forms of fraud against the elderly.**

Health Care -- Health HMOs Dropping Out of Medicare: A number of major HMOs currently participating in the Medicare program are seriously contemplating pulling out of the program prior to the October 1st plan enrollment deadline. As of this writing, it appears that plans serving between 100,000 and 500,000 Medicare beneficiaries may terminate their contracts with the program. These numbers represent a relatively small percentage (5-7 percent) of the 5-6 million beneficiaries participating in Medicare HMOs and do not even include the beneficiaries that would be served by the over 40 contracts HCFA has recently received for new Medicare HMO business. However, if plans follow up on their threat and there is any significant dislocation, this development will no doubt receive a good deal of attention. The HMOs blame inadequate payment rates and excessive regulation. Health economists are generally dubious about "sky is falling" arguments and believe that some companies are simply extricating themselves from some markets from which they cannot make immediate profits. In practice, these HMOs are "cherry picking" the regional payment rates that are generous and dropping those regions that are less lucrative and/or that have relatively small HMO market share. Few experts accept the excessive regulation argument either, as most of these plans comply with extremely similar rules in the private sector. To make the market more attractive and (perhaps) increase the chances some of these plans stay in the program, the industry is asking to be able to cost-shift onto beneficiaries by increasing premiums, co-pays or reducing benefits, particularly drug coverage. Although beneficiaries have chosen to come into these plans precisely because of the marketing of these benefits, the plans correctly argue that Medicare has never guaranteed them. We are currently evaluating whether any of these options would have any real impact on HMO participation in the program and, if so, whether they are worth any serious consideration. We also need to start contemplating the implications of managed care market trends on the upcoming Medicare reform debate. HHS will be briefing Erskine and White House staff on our choices on Monday. In the meantime, we are developing alternatives and alliances with members of the Committees of jurisdiction of both parties, as well as the aging advocates (like AARP), to develop a common position. To date, few are very sympathetic to the objections and proposals raised by HMOs. We will keep you apprised with developments.

Health Care -- FDA Commissioner Update: Jane Henney, your nominee for FDA, was reported out by voice vote out of the Labor and Human Resources Committee this week. Although we remain concerned that one or more of the conservative Republicans (like Nickles) will object to bringing her up for even a vote, this Committee action was extremely encouraging and has brought a sense of optimism that --with some work and horse trading --Dr. Henney has a shot of being confirmed this year. We will re-engage Senator Domenici, her homestate Senator and ally, in pushing some of his Senate Republican colleagues. During the Vice President's Cancer March speech on Saturday, he will challenge to Congress to confirm the first oncologist and the first woman to serve as FDA Commissioner.

Welfare Reform -- New Numbers on Employment of Welfare Recipients: The Census income and poverty numbers released on Thursday show that the rate of employment among former welfare recipients is at an all time high. Thirty-four percent of the individuals who received welfare in 1997 were working in 1998, an increase of one-third since 1996. It is

particularly significant that this employment rate continues to grow even while the welfare caseloads decline, indicating that movement towards work does not appear to be slowing even as we begin to get to the harder cases. We are doing more analysis of these trends, with an eye toward a possible welfare event in late October. Based on a preliminary look, the employment trend for minorities is encouraging.

National Service -- Joint Recruiting by AmeriCorps and the Military: You asked about the status of AmeriCorps recruiting and the feasibility of a proposal to locate AmeriCorps recruiters in military recruiting offices in order to improve AmeriCorps' recruiting success.

- Recruiting Status -- This fall, AmeriCorps will pass the 100,000 member milestone. AmeriCorps is planning swearing-in celebrations nationwide on October 23 and has requested your participation in this event. It took the Peace Corps two decades to reach the 100,000 member mark. AmeriCorps has identified some specific proposals for improvement in the levels of participation that are being evaluated as part the budget process.
- Joint recruiting w/ military. AmeriCorps already participates in a limited joint marketing agreement with the Selective Service, wherein the acknowledgment sent to people who register with the Selective Service asks if the person who registered would like more information about joining the Armed Forces or AmeriCorps. Both the Selective Service and AmeriCorps have come under attack for this arrangement by the press and by Congressional opponents, and Rep Ron Paul (TX) has introduced legislation to end any collaboration between the Selective Service and AmeriCorps. These and other critics have suggested that AmeriCorps recruiting is interfering with military recruiting efforts. Given these factors, AmeriCorps is reluctant to pursue co-location of its recruiting personnel in military recruiting offices.

Children and Families -- After-School Poll: Secretary Riley participated in the release of a new national poll on Thursday finding that Americans overwhelmingly endorse the expansion of after-school programs. Ninety-three percent of those surveyed said they favor making safe, educational programs available to all children in the hours after school, with strong support across party lines and among parents and non-parents. In addition, eighty percent said they would be willing to use additional federal or state tax dollars to fund after-school programs in their community at a cost of \$1,000 per child, even if it raised their individual tax bills by \$10 a year. According to the poll, respondents' chief concerns about the after-school hours were that children are left alone and unsupervised, exposed to negative peer influences and spend too much time watching television. The Secretary also announced a new partnership among the Administration, NBC, "People Magazine," the Ad Council and the Entertainment Industry Foundation to create a new public service announcement campaign to support the expansion of high-quality after-school programs in public schools.

Education Event Next Week: We are working with Sen. Daschle's and Rep. Gephardt's offices to plan an education event next week, that will showcase Democratic unity around your education agenda and challenge the Republicans to (bring your agenda up for a vote before Congress leaves) or (ensure that the final appropriations bill meets your overall funding request for education and specifically includes funding for class size reduction) or (ensure that the final appropriations bill meets your overall funding request for education and specifically includes funding for class size reduction, and school construction).

October 1 Education Event: We are working with Sen. Daschle's and Rep. Gephardt's offices to plan a rally involving you and Congressional Democrats to insist that Congress devote one day before it leaves to taking up your education agenda. Though we have not yet finalized the combination of new initiatives and appropriations items to highlight, it is virtually certain that some form of Patty Murray's class size initiative will be a centerpiece. Sen. Murray has introduced your class size bill, including offsets that fully pay for it. Together with Sen. Harkin, she has also prepared a scaled-down class size initiative that would provide approximately \$500 million in additional Title 1 funding for the purpose of reducing class size.

Education -- Charter School Legislation: We are continuing to work with congressional staff to reach an agreement to bring a bipartisan charter school bill to the floor of the Senate in the next few days. Secretary Riley persuaded Senator Harkin Tuesday to drop an amendment that could block enactment of the bill -- as long as no other amendments to the bill are offered. While we are not currently aware of any other possible amendments, it is still possible that one could be offered -- leading Harkin to offer his amendment too and likely blocking chances of enactment. We are working with congressional staff to resolve what we hope are relatively minor disagreements (including an issue on charter schools and special education also raised by Senator Harkin) through a consensus manager's package that could come to the floor within a few days.

Food Safety: USDA has prepared data on the effectiveness of your science-based food safety program, Hazard Analysis Critical Control Point (HACCP), which shows an almost 50 percent reduction in the frequency of salmonella in broiler chickens and an almost 40 percent reduction in the frequency of salmonella in swine. These data, while preliminary, indicate that HACCP is already having a significant impact on the safety of food American families eat. The DPC provided this data to the Washington Post which plans to use it in a story this Sunday or Monday. We are using this study to demonstrate the effectiveness of the Administration program and to urge Congress to provide full funding for your Food Safety Initiative. It appears that the Agricultural Appropriations conference will meet formally early next week, and we hope this study influences their deliberations.